(23,507. 23,508. 23,509)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 430.

GLOBE BANK AND TRUST COMPANY OF PADUCAH, KENTUCKY, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, BANKRUPT.

No. 431.

FIRST NATIONAL BANK OF PADUCAH, KENTUCKY, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, BANKRUPT.

No. 432.

OLD STATE NATIONAL BANK OF EVANSVILLE, INDIANA, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, BANKRUPT.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 15, 1914.

a United States Circuit Court of Appeals, Sixth Circuit.

No. 2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KY., FIRST NATIONAL Bank of Paducah, Ky., and Old State National Bank of Evansville, Ind., Appellees.

Appeal from the District Court of the United States for the Western District of Kentucky.

RECORD.

Original Transcript Filed February 23, 1911.

1 *Transcript of Record.*

UNITED STATES OF AMERICA,
Western District of Kentucky,
Sixth Judicial Circuit, ss:

To Globe Bank & Trust Company of Paducah, Ky., First National Bank of Paducah, Ky., and Old State National Bank of Evansville, Indiana, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati in said Circuit on the* 27th day of February next, pursuant to an Appeal allowed by the District Court of the United States for the Western District of Kentucky, wherein Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt is appellant and you are appellees to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 31st day of January, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

WALTER EVANS, *Judge.*

*Not exceeding 30 days from the day of signing.

Filed January 31, 1911.
A. G. RONALD, *Clerk.*

Filed Feb. 23, 1911.
[SEAL.] FRANK O. LOVELAND, *Clerk.*

1—430

Received the within Citation and 3 copies at Paducah, Ky., Feb. 11, 1911, and executed same in Paducah, Ky., Feb. 11, 1911 on the Globe Bank & Trust Company of Paducah by delivering a true copy hereof to G. W. Robinson, president and the highest officer found in my District; executed on the First National Bank of Paducah, Ky., by delivering a true copy hereof to G. W. Robinson, vice president and the highest officer of said Company found in my District; executed further on the Old State National Bank of Evansville, Indiana, by delivering a true copy hereof to Henry Hughes,
2 a member of the firm of Wheeler & Hughes, attorneys of record for the said Old State National Bank of Evansville, Indiana.

This Feb. 11, 1911.

Fees $6.00.

G. W. LONG, *U. S. Marshal,*
By ELWOOD NEEL, *D. M.*

Arthur Y. Martin, Trustee in Bankruptcy of Thomas J. Atkins, vs. Globe Bank & Trust Company of Paducah, et al. Citation and 3 copies.

Proceedings of the District Court of the United States for the Western District of Kentucky at a Regular Term Begun and Held at the Federal Court Hall, in the City of Louisville, on Monday, March 14th, 1910.

Present: Honorable Walter Evans, Judge of the United States for said District.

In Bankruptcy.

In the Matter of THOMAS J. ATKINS, Bankrupt.

Be it remembered that heretofore, to-wit, on the 20th day of June, 1910, came Arthur Y. Martin, Trustee of the bankrupt; the Bank of Murray; Citizens Bank of Murray, and Citizens Savings Bank, by counsel, and filed their petition for review from an order of the Referee entered herein on the 21st day of May, 1910.

It is ordered that said petition for review be set for hearing June 25th, 1910.

The Referee's Certificate on review and petition for review are as follows:

In the District Court of the United States for the Western District of Kentucky.

In Bankruptcy.

No. —.

In the Matter of THOS. J. ATKINS, Bankrupt.

Referee's Certificate on Review.

To the Honorable Walter Evans, District Judge:

I, Emmet W. Bagby, the Referee in Bankruptcy in charge of this proceeding, do hereby certify that in the course of such proceedings an order was made by me therein on the 21st day of May, 1910, and entered in said cause on the 23rd day of May, 1910.

That on the 2nd day of June, 1910, Arthur Y. Martin, on behalf of the general creditors of the bankrupt's estate, Bank of Murray and Citizens Bank of Murray, and the Citizens Savings Bank of Paducah, whose claims have been filed and allowed herein against the estate of the bankrupt, feeling aggrieved at the action of
3 the Referee in making said order of May 21st, 1910, filed a petition to review the same.

That a summary of the evidence and other proceedings on which said order was based is as follows:

On the 5th day of May, 1910, Arthur Y. Martin, Trustee of the bankrupt's estate, filed herein a report and petition wherein he prays that an order be made, among other things, asking that it be adjudged to whom he shall pay the proceeds in his hands as such Trustee, etc., accompanied by copy of the proceedings of the Circuit Court of McCracken County, Kentucky, in the consolidated actions of the Globe Bank & Trust Company and others against T. J. Atkins and others, including the judgment of said court in said consolidated actions, the opinion of the Court of Appeals of Kentucky of February 8th, 1910, in the cause of T. J. Atkins' trustee and others against the Globe Bank and Trust Company and others, on appeal from the said judgment of said State Court and all other exhibits referred to in his report.

Copy of order of the United States District Court for the Western District of Kentucky, and copy of agreement and order of confirmation of sale and judgment on the rights of the Globe Bank and Trust Company and American-German National Bank under the lease, in the cause of said Company and others against said T. J. Atkins and others in said State Court.

The Supplemental Petition by the Globe Bank & Trust Co., filed with the Referee herein on May 7th, 1910, with the original and all supplemental petitions therein referred to.

The original Petition filed herein on the 9th day of Jan., 1910, with the Clerk before Hon. Walter Evans, Judge, and filed with the Clerk at Louisville on the 18th day of Feb'y, 1909, and exhibit

"A" referred to in such original petition and filed with the Clerk before Hon. Walter Evans on Feb'y 17th, 1909.

The original Petition in Bankruptcy filed against T. J. Atkins, bankrupt, by the petitioning creditors on Dec. 19th, 1908.

The Amended Proof of Claim filed by the Globe Bank & Trust Company before the Referee on May 12, 1910.

The Petition and Amended Supplemental Proof of Claim of First National Bank of Paducah, Ky., filed with the Referee on May 9th, 1910.

Petition and Amended Supplemental Proof of Claim of the Old State National Bank of Evansville, Ind., filed with the Referee May 9th, 1910.

4 Response of Arthur Y. Martin, Trustee; Bank of Murray and others to petition of Globe Bank & Trust Co. and others, filed with the Referee May 12, 1910.

Reply of Globe Bank & Trust Co. to response of Arthur Y. Martin, Trustee, and others, filed May 13th, 1910; and the Reply of the First National Bank and Old State National Bank to response of Arthur Y. Martin Trustee, and others, filed with the Referee May 16, 1910.

Opinion of Hon. Walter Evans, Judge, Feb'y 18th, 1909.

Brief of authorities cited on issue raised upon the claim of the Globe Bank & Trust Co. and others filed with the Referee May 21st, 1910.

Order of Referee made May 21st, 1910, and filed May 23rd, 1910, directing the Trustee of the Bankrupt's estate to pay to the Globe Bank & Trust Company and other antecedent creditors of the Bankrupt the entire fund in the Trustee's hands, pro rata.

The question presented on this review is,

Whether the Referee erred in making said order of May 21st, 1910, adjudging the entire funds in the hands of the Trustee to said Globe Bank & Trust Co., First National Bank and Old State National Bank, exclusive of the general creditors of the Bankrupt's estate, and directing the Trustee to pay said funds to said three creditors.

I hand up herewith for the information of the Judge, together all the papers hereinabove referred to, and which are pertinent to this review. A copy of this certificate has been furinshed to counsel for the several parties interested.

This certificate was prepared to be sent up on the 4th of June, but was left open for the Trustee to fill in the blanks in his petition for review which had not been inserted before because the data therefor had not been obtained by him and the same was filled in today by him.

All of which is respectfully submitted to the Court this the 18th day of June, 1910.

EMMET W. BAGBY,
Referee in Bankruptcy.

In the United States District Court for the Western District of Kentucky.

In Bankruptcy.

In the Matter of THOMAS JEREMIAH ATKINS, Bankrupt.

Petition of Arthur Y. Martin, Trustee in Bankruptcy of T. J. Atkins, Bankrupt; Bank of Murray, Citizens Bank of Murray and Citizens Savings Bank.

5 Comes Arthur Y. Martin, the duly elected, qualified and acting Trustee in Bankruptcy of Thomas Jeremiah Atkins, bankrupt, petitioner herein on behalf of the general creditors of this bankrupt estate; Bank of Murray and Citizens Bank of Murray, both of Murray, Kentucky; and the Citizens Savings Bank of Paducah, Kentucky, creditors whose claims have heretofore been filed and allowed against the estate of this bankrupt, and respectfully represent:

1. That on the 3rd day of December, 1906, the bankrupt, T. J. Atkins, conveyed various parcels of real estate, description of which is fully set forth in the judgment of the McCracken Circuit Court, hereinafter referred to, to Ed. L. Atkins, a son of the bankrupt, and to the children of the said Ed. L. Atkins. That at the time said conveyance was made the bankrupt was indebted to the Globe Bank & Trust Company of Paducah, Kentucky, the First National Bank of Paducah, Kentucky, and the Old State Bank of Evansville, Ind., and after the execution and delivery of said deed the bankrupt incurred other indebtedness to the three petitioning banks herein and to various other creditors.

That on the 25th day of August, 1908, the Globe Bank & Trust Company instituted a suit in the McCracken Circuit Court at Paducah, Kentucky, against the said T. J. Atkins and the vendees named in said deed, seeking a judgment for the amount of the debt due by the bankrupt to said bank and to set aside the deed of conveyance as fraudulent and void, and at the time of the institution of said action had issued an attachment which was levied upon the real estate referred to. Thereafter similar actions were filed by the First National Bank of Paducah and the Old State Bank of Evansville, Ind., seeking the same relief, and in which actions likewise attachments were issued and levied upon said property.

That thereafter, and within less than four months from the institution of any of said actions, a petition in bankruptcy was filed in the United States District Court for the Western District of Kentucky against the said T. J. Atkins, and upon which, in due course, to-wit, on the 28th day of December, 1908, the said Atkins was duly adjudicated a bankrupt.

II. That thereafter to-wit, on the 9th day of January, 1909, the Globe Bank & Trust Company filed its petition in this bankruptcy proceeding, contesting the jurisdiction of this court to interfere with

its suit pending in the State Court for the recovery of said property for its exclusive benefit; and

6 Thereafter on the 20th day of January, 1909, and before the District Court had heard the petition filed on January 9th, it filed another petition repeating its objection to this court's entertaining jurisdiction over any effort of the Trustee and creditors to recover said property as against the rights of the Globe Bank & Trust Company; and in said second petition also prayed that the attachment lien obtained through its State Court proceeding be preserved under Section 67*f* of the Bankrupt Act for the benefit of the estate, and that it be permitted to make the Trustee, A. Y. Martin, a party defendant in said State Court proceeding.

That thereafter, upon due consideration, the Court entered an order on February 18th, 1909, directing that said attachment lien "be preserved for the benefit of the bankrupt's estate as provided in Section No. 67*f* of the Bankrupt Act;" and, further in said order authorized the Trustee to institute an action for the recovery of said property, or to intervene in said proceedings pending in the State Court.

III. That thereafter the Trustee instituted an action in the McCracken Circuit Court praying that said conveyance be set aside as fraudulent and void as against creditors whose indebtedness was created both before and after the execution and delivery of the deed first above mentioned, and asserting his right as Trustee in Bankruptcy to be substituted as the real party in interest in the suits then pending for the recovery of said property in the State Court, and to receive the benefit of any and all recoveries in any of said actions and to all rights which any creditor of the bankrupt could assert, and that all such rights of action and recoveries resulting therefrom passed to the Trustee as assets of the bankrupt estate.

That the Trustee's action was consolidated with the actions then pending in the McCracken Circuit Court, and that thereafter in due course the McCracken Circuit Court rendered judgment in said consolidated actions, adjudging that said conveyance was constructively fraudulent and voidable as to creditors whose indebtedness was created before the execution and delivery of the deed, and adjudged that enough of said property should be sold to realize that amount, and adjudged that the conveyance was not actually fraudulent, and, therefore, not voidable as to creditors whose indebtedness was created after the execution and delivery of the deed.

In said judgment the McCracken Circuit Court appointed this Trustee in Bankruptcy as Special Commissioner of the

7 McCracken Circuit Court, with authority to sell said property in conformity w-th the judgment, and directed the Trustee as Special Commissioner, after selling said property, "to collect the proceeds of sale so soon as the bonds are due and hold all of the proceeds subject to the final orders of this Court in the further and final disposition of such proceeds, or subject to the District Court of the United States for the Western District of Kentucky in the matter of T. J. Atkins, bankrupt, now pending in such court under its final distribution of the entire assets of the

estate of such bankrupt in the final adjustment and settlement of all its affairs before such court in such proceedings now pending therein in bankruptcy, and the rights of all creditors in such bankrupt proceedings in the distribution or disposition of such proceeds by the bankrupt estate are hereby reserved and not determined, but left open for final adjudication among them in such proceedings in bankruptcy."

IV. That thereafter the Trustee herein appealed from the judgment of the McCracken Circuit Court to the Kentucky Court of Appeals, complaining that the judgment of the Circuit Court directed the proceeds of the sales' bonds be collected by the Trustee acting as Special Commissioner be held subject to the final orders of the McCracken Circuit Court or to the final orders of this Court of bankruptcy in the distribution of such proceeds of sale.

The Trustee's objection being to the alternative direction contained in said judgment, and in his appeal he sought to have said fund paid over to him as Trustee in Bankruptcy to be disposed of and distributed by this court of bankruptcy alone.

The Court of Appeals of Kentucky affirmed the judgment of the lower court, but construed the judgment to mean that said fund should be paid over to the Trustee in Bankruptcy, "to be administered as a part of the bankrupt estate in the bankruptcy court."

V. That on May 5th, 1910, the Trustee herein filed his report of the sale of said property and asked the direction of the Court in the disposition of the proceeds of sale. That the Globe Bank & Trust Company, First National Bank and the Old State Bank of Evansville, Ind., thereupon filed their petitions herein claiming the whole fund recovered, to the exclusion of creditors whose debts were created subsequent to the conveyance above mentioned. To which answers were filed and issue joined by the Trustee on behalf of the general creditors and your three petitioners herein, and thereafter, upon hearing, the Referee on May 23rd, 1910, entered an order adjudging that the three creditors whose debts were created
8 antecedent to the execution and delivery of the deed were entitled to the full amount for which the property sold, to-wit, $16,146.58, this being less than the total amount of their debts so created, and leaving nothing from the sale of said property for the general creditors.

VI. Your petitioners say that this Court by its order entered on February 18th, 1909, preserved the attachment liens against said property for the benefit of the bankrupt estate. That said lien would have become null and void by reason of the bankruptcy of the bankrupt herein within four months from the time said attachments were levied had this Court not preserved said lien and had not said lien, by operation of law, and through the orders of this Court, passed to the Trustee for the benefit of the whole bankrupt estate.

VII. That under Section No. 70*a*, 4 this property transferred by the bankrupt in fraud of his creditors passed to the Trustee as an asset of the bankrupt estate, and

That under Section 70*e* the right of action for the recovery of

said property passed to the Trustee, together with the right in him to take and receive the recovery in such actions for distribution among the general creditors of the estate.

Your petitioners say that the ruling and decision of the Referee, allowing the Globe Bank & Trust Company, First National Bank and the Old State Bank to take and receive said entire fund to the exclusion of general creditors, and adjudging that they, either under the bankrupt law or the laws of the State of Kentucky, as antecedent creditors, had a prior right to said fund, was an error and that said fund should, under the direction of the Referee, have been distributed among creditors generally, without priority or preference in favor of creditors whose debts were created prior to the fraudulent conveyance.

Your petitioners, therefore, desire a review by the Judge of this court of the order made by the Referee, and they pray that the error complained of on questions of law and facts raised before said Referee, and heard by him, may be certified by the said Referee to the Honorable Walter Evans, District Judge; that he may review the order heretofore made and make and enter an order or direct the Referee to make and enter an order setting aside his said order entered herein on May 23*th*, 1910, and direct that the fund realized from the sale of said real estate, to-wit, the sum of $16,146.58, be distributed pro rata among all the creditors of this bankrupt estate whose claims have been duly proved and allowed.

9 A. Y. MARTIN,
Trustee of T. J. Atkins, Bankrupt.
BANK OF MURRAY,
CITIZENS BANK OF MURRAY,
CITIZENS SAVINGS BANK,
By —— ——,
Attorneys.

UNITED STATES OF AMERICA,
Western District of Ky., County of McCracken, ss:

We, A. Y. Martin, Trustee, one of the petitioners; W. D. Paxton, President of the Citizens Saving- Bank, and J. D. Mocquot, attorney for the Citizens Bank of Murray, and Bank of Murray, petitioners mentioned and described in the foregoing petition, do hereby make a solemn oath that the statements therein are true according to the best of our knowledge, information and belief.

A. Y. MARTIN.
W. F. PAXTON.
J. D. MOCQUOT.

Subscribed and sworn to before me by the above named parties on this the 2nd day of June, 1910.

[SEAL.] GRACE A. HENDERSON,
Notary Public.

The Report and Petition of A. Y. Martin, Trustee, with Exhibits A, B, C, D and E filed June 20th, 1910 are as follows:

In the District Court of the United States for the Western District of Kentucky.

In Bankruptcy.

In the Matter of T. J. ATKINS, Bankrupt.

Report and Petition of Trustee.

Comes Arthur Y. Martin, as trustee of the estate of said bankrupt, and respectfully represents to the court that during the pendency of this proceeding he was, on the 8th day of April, 1909, authorized by order of court herein to institute an action in the McCracken Circuit Court for the purpose of having set aside and annulled a certain deed of conveyance executed and delivered by said bankrupt to Ed. L. Atkins and others. Order of the District Court filed herein February 19th, 1909, and order of Emmet W. Bagby, Referee, filed herein April 8th, 1909, are now referred to and made a part hereof.

Trustee further shows that thereafter on the 9th day of April 1909, he filed an action in the McCracken Circuit Court for the benefit of the estate of said bankrupt for the purpose afore-
10 said, and his action was thereafter by order of the McCracken Circuit Court consolidated with the action of the Globe Bank & Trust Co. et al. vs. Ed. L. Atkins, etc. pending in said Circuit Court prior to the bankruptcy herein; that in said consolidated action in the McCracken Circuit Court a judgment was on the 19th day of June, 1909, rendered by the court, a copy of which is herewith filed, marked "Exhibit A," now referred to and made a part hereof; that from said judgment an appeal was taken by the defendants in the action and by Arthur Y. Martin, as trustee, and in said action a decision was rendered by the Court of Appeals of Kentucky, as shown by the mandate and opinion of the Court of Appeals filed in said consolidated action in the McCracken Circuit Court. A copy of said opinion is herewith filed, marked "Exhibit 2," now referred to and made a part hereof. Thereafter, and on the 31st day of March, 1910, a judgment was, in accordance with the mandate and opinion of the Court of Appeals of Kentucky, filed in said consolidated actions in the McCracken Circuit Court. A copy of said judgment is herewith filed, marked "Exhibit C," now referred to and made a part hereof.

That, on the 2nd day of April, 1910, in said cause pending in the McCracken Circuit Court, an order as indicated in said opinion of the Court of Appeals was filed, wherein Arthur Y. Martin, as Special Commissioner of the McCracken Circuit Court, is authorized and directed to pay from the sums derived from the sale bonds the costs of said consolidated actions incidental to the proceedings and judgment setting aside the deed in controversy, and the execution of such judgment in said court, and credit such amount as Commissioner on the purchase money bonds executed to him; that the proceeds of such bonds is ordered into the hands of Arthur Y.

Martin as trustee in bankruptcy for T. J. Atkins, to be collected by him as such trustee upon the sale bonds held by him, subject to the future orders of the District Court of the United States for the Western District of Kentucky, etc. Copy of said order is herewith filed, marked "Exhibit D."

Now trustee respectfully shows that one of the sale bonds executed to him as Special Commissioner aforesaid, being the bond of E. G. Boone, for $2,510.00, has been paid, and he has received therefrom the sum of $2,585.30, out of which he has paid under the order of the Circuit Court aforesaid the costs of said action amounting to $470.29, leaving to be paid to himself as such trustee the sum of $2,115.01, which sum will be paid forthwith for distribution herein; that the remainder of said sale bonds have not been paid.

11 but have by the order of court aforesaid been ordered into his hands as trustee for collection, and there is now due on same, and should be paid to him as follows:

Old State National Bank of Evansville, Ind. (purchase money bond, with interest to date)	$3,171.71
That said bank is entitled to a credit of the amount of rents collected on said property from Oct. 9, 1909, to date, amounting to $200.00, less the costs of necessary repairs made during said time, by order of purchaser, amounting to $10.70	189.30
	$2,982.41
First National Bank of Paducah, Ky. (purchase money bond with interest to date)	$2,857.16
That, however, said bank is entitled to the amount *or* rents collected from the said property since Oct. 9, 1909, to date of confirmation sale, amounting to $200.00, less the costs of necessary repairs made during said time by order of purchaser, amounting to $4.00	196.00
	$2,661.16
Globe Bank & Trust Co. of Paducah, Ky. (purchase money bond, with interest to date)	$8,388.00
That no rents have been collected from said property by said trustee at any time.	
A. Y. Martin, Special Commissioner (proceeds of sale bond of E. G. Boone)	$2,115.01
Making the total sum that should come into said trustee's hands for distribution under order of Court herein the sum of	$16,146.58

Trustee further reports that he has paid out of the rents collected by him to John W. Ogilvie, Sheriff, $173.82, being balance due

on State and County taxes on said property for year 1908, a portion of said taxes having been paid by the bankrupt; that he is advised that there are now certain taxes due from the estate of said bankrupt on the property sold in the proceedings aforesaid as follows:

City of Paducah, last half of 1908	$134.89
City of Paducah, taxes for 1909	255.31
Gus G. Singleton, Clerk, State and County taxes for 1909	215.95
	$606.15

12 Statements of said alleged taxes as furnished by the officials demanding payment thereof are herewith filed for inspection and approval.

Trustee further represents that the Old State National Bank and the First National Bank should be required to pay to said estate at least $20.00 each, or 10 per cent of the amount of rents collected for said banks by the Trustee since the confirmation of sale, and for which said banks are credited in this report for approval as a credit on their sale bonds.

Trustee further reports that the consolidated actions of the Globe Bank & Trust Company and others against T. J. Atkins and others, originally brought in the State Court, were prosecuted to final judgment in McCracken Circuit Court, resulting in the judgments, copies of which have been filed as exhibits with this report. But on the petition of the Globe Bank & Trust Company in this court before Hon. Walter Evans, Judge, an order and judgment was rendered as now on file in these proceedings, and now referred to and made a part hereof, in which it was ordered and adjudged that the attachments sued out in the State Court should be reinstated and the liens created thereby should be preserved for the benefit of the creditors of the bankrupt estate; and that such actions might proceed to final trial and judgment on the merits in the McCracken Circuit Court; and the action referred to brought by the trustee in such court was, by order of such court, consolidated with the other consolidated actions therein pending and all were tried and determined by the judgment of such court as submitted in this report.

Trustee further reports that the Globe Bank & Trust Company, the Old State National Bank of Evansville, Ind., and the First National Bank of Paducah, as prior creditors, assert and claim priority over all subsequent creditors for the payment of their debts out of the funds recovered by so setting aside the fraudulent deed in controversy; and upon this question the Trustee prays the advice and judgment of this Court in the final distribution of the funds in his hands arising from such source. Should such funds be adjudged in priority to the parties named, they are insufficient in amount to pay their debts as directed by the judgment of the State Court; and such parties having purchased the property for which the uncollected sale bonds referred to were executed, their payment can be effected by the cancellation of their bonds in so adjudging them the funds, after payment of all costs herein reported.

Trustee further shows that on the 15th day of July, 1909,
13 he filed herein his petition wherein he asserted claim to a certain lease on the property of the bankrupt situated on North Fourth Street in Paducah, Kentucky, and occupied by Rhodes-Burford Co., and on the 9th day of October, 1909, an order was made herein permitting the Globe Bank & Trust Co. and others to litigate and have determined in the McCracken Circuit Court the matters incidental to the jurisdiction of said State Court, in the execution and enforcements of its judgment sale. Thereafter in said action in the State Court an agreement between the American-German National Bank, Globe Bank & Trust Co., First National Bank, and the Old State National Bank was filed October 9, 1909. A copy of said agreement *in* herewith attached, marked Exhibit "E."

Trustee further shows that he files herein separate report and account of rents collected for the benefit of the estate of said bankrupt prior to the confirmation of the sale aforesaid.

Wherefore, trustee prays that an order be made herein that he collect unpaid sale bonds in accordance with the order of this Court, in the event the funds represented by said bonds shall be adjudged in favor of said banks claiming priority after the payment of the costs and taxes herein; that he pay said taxes and the cost of this proceeding, and that it be adjudged to whom he shall pay the proceeds, and for all proper orders for the disposition of said funds and the closing of said estate.

ARTHUR Y. MARTIN,
Trustee T. J. Atkins, Bankrupt.

Copy of Order.

It is now further ordered that the special commissioner, Arthur Y. Martin, will first pay from the proceeds of the sale bonds executed herein the general cost of these consolidated actions incidental to the proceedings and judgment setting aside the deed in controversy and the execution of such judgment in this court and credit such amount as commissioner on the purchase money bonds executed to him; and all of the balance of the proceeds of such bonds are hereby ordered and adjudged into his hands as Trustee in Bankruptcy of T. J. Atkins, bankrupt, to be collected by him as such Trustee upon the sale bonds herein executed and held by him subject to the future orders of the District Court of the United States for the Western District of Kentucky in the matter of T. J. Atkins, bankrupt, therein pending in bankruptcy, and as such court may finally determine the rights of all parties under the judgment of this court as hereinbefore rendered; and upon such other matters as
14 may be pending, or may be presented in such proceedings pending in bankruptcy in the District Court of the United States for the Western District of Kentucky, as aforesaid.

EXHIBIT "D" WITH TRUSTEE'S REPORT & PETITION.

McCracken Circuit Court.

GLOBE BANK & TRUST COMPANY, etc., Plaintiffs,
vs.
T. J. ATKINS et al., Defendants.

Agreement.

It is hereby agreed between the American-German National Bank and the Globe Bank & Trust Company, the First National Bank of Paducah and the Old State National Bank of Evansville, Indiana, that the former shall have the rents under the lease transferred to it by T. J. Atkins on the Rhodes-Burford Company for the property occupied by such Company on the East side of North 4th Street in Paducah, Kentucky, for a period of two years from the date of confirmation of the report of sale made by Arthur Y. Martin, trustee and commissioner in the above styled case, or from this date, should confirmation be delayed; and the American-German National Bank hereby surrenders and transfers such lease to the Globe Bank & Trust Company and others aforesaid for the remainder of the term of the lease in all other respects and with all rights as set forth in the lease, and the American-German National Bank released and abandons all claim to prorate with either of the other banks named in the proceeds arising from the sale of property in the above styled action, for any debts or demands owing to or claimed to be owing to such bank no matter when created, or how incurred; unless should the courts finally adjudge that the three prior creditors named in the judgment setting aside the deed should not be entitled to priority over subsequent creditors to the execution of such deed and distribute the funds among the general creditors such bank may then so share in such proceeds for any valid claims.

AMERICAN-GERMAN NATIONAL BANK,
By BRADSHAW & BRADSHAW, *Attorneys.*
GLOBE BANK & TRUST CO.,
By D. G. PARK, *Attorney.*

EXHIBIT "E" WITH REPORT & PETITION OF TRUSTEE.

City of Paducah,
Office of Delinquent Tax Collector,
Bruce M. Philley,
117½ S. 4th St.
Phone, Old 55-r; New 60.

T. J. Atkins, Dr., to City of Paducah.

15	Bal. on last ½ of 1908 Taxes	$115.30
	10 per cent Pen	11.53
6 per cent Int		8.06
		$134.89

PADUCAH, KY., *Mch.* 16, 1910.

T. J. Atkins, Dr., to City of Paducah, Ky.

Taxes for 1909.....$255.31

GEO. W. WALTERS, *Treasurer.*

PADUCAH, KENTUCKY, *March* 15, 1910.

A. Y. Martin, for T. J. Atkins' Est., to Gus G. Singleton, Dr., Clerk McCracken County Court.

State Tax, Int. & Pen.....	$98.49	
County Tax, Int. & Pen.....	117.46	
		$215.95

EXHIBIT "A" WITH TRUSTEE'S REPORT & PETITION.

McCracken Circuit Court.

Equity.

Hon. J. C. Speight, Special Judge, Presiding.

GLOBE BANK & TRUST CO., &c., Pl'ffs,
agt.
T. J. ATKINS, &c., Def'ts.

Consolidated Actions.

This day came Hendrick & Corbett, Attys. for T. J. Atkins and others, and filed written motion and moved the Court to set aside the order of submission of these consolidated actions to the court for trial, and for a continuance of said consolidated actions. The plff., Globe Bank & Trust Co., objected to setting aside order of submission, and for a continuance of these consolidated actions, in so far as same effects its original action and the original actions of all other creditors consolidated herewith. The Court being advised, overruled said motion to set aside the order of submission and for a continuance of these consolidated actions, to which said Hendrick & Corbett, attys. on behalf of said defts., objected and excepted. The plff., Globe Bank & Trust Co., filed written exceptions to the deposition of Moscoe Burnett taken and filed herein. The defts. also filed written objections to competency of evidence herein. Pending the submission of these consolidated actions, the deft., T. J. Atkins, filed answer to amended petition of plff., Globe Bank & Trust Co., filed herein March 19th, 1909, and by agreement of parties the affirmative allegations contained in said answer are
16 controverted of record by all the plffs. to these consolidated actions. The defts., T. J. Atkins and others, filed deed from T. J. Atkins to Ed L. Atkins and others as exhibit to be relied on as evidence herein. By agreement of parties pending the argu-

ment, on motion of defts., witness Hiram Smedley was permitted to testify for the dfts. orally in court with his evidence to be considered by the Court on the trial in such form, but by further agreement it is ordered that this testimony so given shall be taken and reported by Miss Isla Ellis as this court's Official Reporter and made a part of the record of these consolidated actions through her report to this Court, to be duly approved and signed by the Judge herein. The plff., Globe Bank & Trust Co., executed bond as required by Section 410 of the Civil Code of Practice, with G. W. Robertson and C. E. Jennings as sureties thereon, which bond was accepted and sureties approved by the Court. The plff., Old State National Bank, executed bond as required by Section 410 of the Civil Code of Practice, with D. H. Hughes as surety thereon, which bond was accepted and surety approved by the Court. The plff., First National Bank of Paducah, Ky., executed bond as required by Section 410 of the Civil Code of Practice, with Robert L. Reeves and S. Wallace Weil as sureties thereon, which bond was accepted and sureties approved by the Court. The following judgment was filed in these consolidated actions, viz:

"These consolidated actions having been submitted to the Court for trial, and having been heard upon the pleadings, exhibits and proof on file, and the Court being advised, it is hereby adjudged that the deed in controversy bearing date December 3rd, 1906, from T. J. Atkins to Ed. L. Atkins, Elizabeth Atkins Graham, Edward Atkins, Grace Atkins and Elmonia Atkins for the lands and real estate hereinafter described was not delivered and accepted until after the 20th day of April, 1907; and it is further adjudged that such deed is without any valuable consideration whatever and voluntary and constructively fraudulent and void as against the debt sued on by the Globe Bank & Trust Company amounting to $10,285.00, with interest from the 16th day of Oct., 1908, at 6 per cent per annum until paid and its costs herein expended, for which a trust is hereby declared in such real estate for the payment of such debt, interest and costs, and to which such deed is hereby set aside and held for naught, and the Globe Bank & Trust Company's attachment levied on such property is hereby sustained.

It is further adjudged that such deed is also without any valuable consideration whatever and constructively fraudulent and
17 void as against the debt herein sued on by the Old State National Bank of Evansville, Indiana, for $5,012.00, with 6 per cent interest from the 29th day of Sept., 1908, until paid and its costs herein expended, and its attachment levied on such real estate is hereby sustained and the deed from T. J. Atkins to Ed L. Atkins, Elizabeth Atkins Graham, Edward Atkins, Grace Atkins and Elmonia Atkins bearing date December 3rd, 1906, but not delivered or accepted until April 20th, 1907, is hereby set aside and the trust declared out of the property hereinafter described for the payment of such debt, interest and costs and the deed as to such debt is held for naught.

It is hereby further adjudged that the deed aforesaid is without any valuable consideration whatever and constructively fraudulent

and void as against the debt herein sued on by the First National Bank of Paducah, Kentucky, for $6,000.00, with interest from the 16th day of October, 1908, and its costs herein expended, and its attachment levied upon such property is hereby sustained and said deed bearing date December 3rd, 1906, but delivered and accepted April 20th, 1907, from T. J. Atkins to Ed L. Atkins, Elizabeth Atkins Graham, Edward Atkins, Grace Atkins and Elmonia Atkins conveying the property hereinafter described is hereby set aside and a trust declared in such property for the payment of the plaintiff, First National Bank of Paducah's debt, interest and cost; and such deed as to such debt is hereby set aside and held for naught. But it is further hereby adjudged that as to all other debts herein sued on, seeking to set aside such deed—one in favor of the City National Bank of Paducah for $501.66; one in favor of the Bank of Murray for $5,000.00; one in favor of the Citizens Bank of Murray for $2,500.00, and one in favor of the Citizens Savings Bank of Paducah, Kentucky, for $2,558.50—were all created subsequent to the execution of such deed, and that upon the proof such deed is not actually fraudulent and was not executed with any actual fraudulent intent on the part of T. J. Atkins; and as to each and all of such debts in favor of such parties whose debts were created since its execution, these actions are dismissed absolutely in so far as they seek to set aside such deed, and it is adjudged that such creditors have no trust in the property therein conveyed for the payment of their debts, or either of them. But the Clerk will enter a personal judgment for each debt and costs.

It is now ordered and adjudged that all of such property so conveyed, or so much thereof as may be necessary to pay the debts in favor of the Globe Bank & Trust Company aforesaid, the Old State National Bank of Evansville, Indiana, aforesaid, and the
18 First National Bank of Paducah, Kentucky, aforesaid, shall be sold at public auction at the court house door in the City of Paducah, Kentucky, on the first day of some regular term of the McCracken County or Circuit Court, begun and held for McCracken County, Kentucky, at public auction to the highest and best bidder, on a credit of six months with 6 per cent interest from the day of sale until paid, the purchasers executing bond with good and sufficient sureties, having the force and effect of a replevin bond upon which execution may issue when due, and also retain a lien on the land or lots so sold as additional security to secure the unpaid purchase money. But before sale the commissioner and trustee shall advertise the sale and terms of sale and the amount of money to be raised for the same length of time and in the same manner as is required by law for sales of similar property under execution, and he will report his acts to this Court and collect the proceeds of sale so soon as the bonds are due and hold all of the proceeds subject to the final orders of this court in the further and final disposition of such proceeds, or subject to the District Court of the United States for the Western District of Ky. in the matter of T. J. Atkins, bankrupt, now pending in such court under its final distribution of the entire assets of the estate of such bankrupt in the final adjust-

ment and settlement of all of its affairs before such court in such proceedings now pending therein in bankruptcy, and the rights of all creditors in such bankrupt proceedings in the distribution or disposition of such proceeds by the bankrupt court are hereby reserved and not determined but left open for final adjudication among them in such proceedings in bankruptcy.

It is further adjudged that the action of Arthur Y. Martin, trustee in bankruptcy for T. J. Atkins, bankrupt, is also dismissed absolutely in so far as it seeks to set aside the deed bearing date December 3rd, 1906, but executed April 20th, 1907, from T. J. Atkins to Ed L. Atkins and others for the benefit of any creditors of the bankrupt estate whose debts were created after the execution of such deed. To which Arthur Y. Martin, trustee in bankruptcy for T. J. Atkin-, bankrupt, and the creditors whose actions aforesaid are all so dismissed, except, and pray an appeal to the Court of Appeals, which is granted.

The trustee in bankruptcy, Arthur Y. Martin, is hereby appointed this Court's commissioner to execute this judgment in all respects as herein directed, and he is now further directed to sell the real estate hereinafter described in separate parcels, but each par-
19 cel as an entirety or enough thereof to pay the debts aforesaid—the property so adjudged and directed to be sold is particularly described as follows:

"Part of lot No. 123 in Block 18, lower addition to the City of Paducah, beginning in the center of said block and running 173 feet 3 inches to Walnut street (now Sixth street); thence down Walnut (now Sixth street) 57 feet 9 inches; thence at right angles toward Chestnut (now Fifth street) 173 feet 3 inches; thence at right angles towards Monroe street 57 feet 9 inches to the beginning—being part of the same property conveyed to said Miranda A. Lee by D. A. Givens—See Deed Book "R," page 600—together with all buildings and improvements thereunto belonging or in any wise appertaining. Being the same described in a deed from M. A. and A. C. Lee to T. J. Atkins, dated first day of June, 1881, and recorded in the county court clerk's office of McCracken County, Kentucky, in Deed Book 27, page 523.

Also all the certain real estate lying in the City of Paducah, County of McCracken and State of Kentucky, described as follows, to-wit:

One third of one fourth of Block No. 18 and one fourth of *Block of* lot No. 123, beginning at the center of block No. 18 and running 173 feet 3 inches to Sixth street (formerly known as Walnut street) in Paducah, Kentucky, and fronting 57 feet and 9 inches on Sixth street; and one half of two thirds of one fourth of lots No. 123, all in addition "D" Lower Town of Paducah, Kentucky, beginning 57 feet 9 inches from the corner of Madison street on 6th St.; thence towards the Ohio River with Madison street 173 feet 3 inches; thence at right angles in a Southeastern direction 57 feet and 9 inches; thence at right angles 173 feet 3 inches to Sixth street; thence with Sixth street 57 feet and 9 inches to the beginning, being the property purchased by D. A. Givens at Sheriff's sale by

deed of J. C. Calhoun, sheriff, dated December 18, 1867—it being the same tract of land described in a deed from Miranda A. Lee to T. J. Atkins, dated the 2nd day of December, 1899, and recorded in deed book No. 59, page 160.

Also that certain lot of ground situated in the City of Paducah, McCracken County, Kentucky, and lying on the east side of Fourth street, being between Broadway and Jefferson streets, and being the south half of lot 148, block No. 13, town "A," and more particularly described as follows:

Beginning on the east line of Fourth street at the center of the west line of said lot No. 148; thence with said east line of Fourth street towards Broadway street 28 feet 10½ inches to a stake; thence at right angles towards Third street 144 5-12 feet to a stake; thence at right angles towards Jefferson street 28 feet 10½ inches; thence at right angles and through the center of lot No. 148, 144 5-12 feet to the beginning—said lot being the same in all respects conveyed by Lucy V. Overby and H. C. Overby to John G. Rinkliff, trustee of Magnum Lodge No. 21 Independent Order of Odd Fellows, and being the same lot in all respects conveyed by John G. Rinkliff, trustee of Magnum Lodge No. 21 Independent Order of Odd Fellows, and T. J. Atkins, trustee of Ingleside Lodge No. 195 Independent Order of Odd Fellows, etc., to Ed L. Atkins, named in said deed—on the 9th day of March, 1901; also a passage-way from the lot hereby conveyed over and across the rear end of the North half of lot No. 148; said passage-way being 12 feet wide and extending from the lot conveyed to Anna L. Parham, so as to connect with the 20 foot alley situated between the North end of Geo. Rock's lot and the South side of said Leech property, said last named alley instead of being a public alley the parties to this deed are to have the use and enjoyment of said passage-way for ingress and egress to and from said public alley and in accordance with the terms of all previous deeds made in reference thereto—it being the same real estate conveyed by Ed L. Atkins to T. J. Atkins by deed 11th day of March, 1901, and recorded in deed book No. 63, page 218, and subject to all the conditions and agreements therein expressed.

Also the following described property situated on 8th street between Monroe and Madison and on the West side of 8th street which was conveyed heretofore by Ed H. Puryear, commissioner, to T. J. Atkins by deed recorded in commissioner's deed book No. 4 on page No. 86, and which is dated 15th day of April, 1897, and which lot or parcel of ground is described as follows:

Beginning at a point on the south side of 8th street (formerly Hickory) 57 feet and 9 inches below the corner of Monroe and 8th streets; thence down 8th street towards Madison street 57 feet and 9 inches; thence at right angles towards 9th street 173¼ feet; thence at right angles towards Jefferson street 173¼ feet; thence at right angles towards Jefferson street 57¾ feet to Hopkins' line; thence down said line 173¼ feet to the beginning—same being part of lot No. 132, block No. 27 of the City of Paducah, Kentucky,—together with all the improvements and appurtenances, rights and easements

thereunto belonging." But the trustee and commissioner will execute bond in due form herein. To each and all of which defendants except and pray an appeal to the Court of Appeals, which is granted."

21 It is adjudged by the Court that the plff., Globe Bank & Trust Co., do recover of the deft., T. J. Atkins, the sum of Ten Thousand, Two Hundred and Eighty-five Dollars, with interest thereon at the rate of six per cent per annum from the 16th day of October, 1908, until paid, and its cost herein expended, and for which an execution is awarded. To all of which judgment of the Court the deft., T. J. Atkins, objects and excepts and prays an appeal to the Court of Appeals, which is granted.

It is further adjudged by the Court that the plff., Old State National Bank, do recover of the deft., T. J. Atkins, the sum of Five Thousand and Twelve Dollars, with interest thereon at the rate of six per cent per annum from the 29th day of Sept., 1908, until paid, and its cost herein expended, and for which an execution is awarded. To all of which judgment of the court said deft., T. J. Atkins, objects and excepts and prays an appeal to the Court of Appeals, which is granted.

It is further adjudged by the Court that the plff., First National Bank of Paducah, Ky., do recover of the deft., T. J. Atkins, the sum of Six Thousand Dollars, with interest thereon at the rate of six per cent per annum from the 16th day of Oct., 1908, until paid, and its costs herein expended, and for which an execution is awarded. To all of which judgment of the Court said deft., T. J. Atkins, objects and excepts and prays an appeal to the Court of Appeals, which is granted.

It is further adjudged by the Court that the plff., City National Bank of Paducah, Ky., do recover of the deft., T. J. Atkins, the sum of Five Hundred and One & 66-100 Dollars, with interest thereon at the rate of six per cent per annum from the 29th day of Sept., 1908, until paid, and its cost herein expended, and for which an execution is awarded. To all of which judgment of the Court said deft., T. J. Atkins, objects and excepts and prays an appeal to the Court of Appeals, which is granted.

It is further adjudged by the Court that the plff., Citizens Bank of Murray, do recover of the deft., T. J. Atkins, the sum of Two Thousand Five Hundred Dollars, with interest thereon at the rate of six per cent per annum from the 14th day of July, 1908, until paid, and its cost herein expended, and for which an execution is awarded. To all of which judgment of the Court said deft., T. J. Atkins, objects and excepts and prays an appeal to the Court of Appeals, which is granted.

It is further adjudged by the Court that the plff., Citizens Savings Bank of Paducah, Ky., do recover of the deft., T. J. Atkins, the sum of Two Thousand, Five Hundred and Fifty-eight &

22 50-100 Dollars, with interest thereon at the rate of six per cent per annum from the 5th day of June, 1908, until paid, and its cost herein expended, and for which an execution is awarded. The grounds of attachment as against deft., Ed L. Atkins, are sus-

tained, but the levy of said attachment having been made on property adjudged to have been fraudulently conveyed, the sale is now discharged. To all of which judgment of the Court said deft., T. J. Atkins, objects and excepts and prays an appeal to the Court of Appeals, which is granted.

It is further adjudged by the Court that the plff., Bank of Murray, do recover of the deft., T. J. Atkins, the sum of Five Thousand, One Hundred and Twenty & 83-100 Dollars, with interest thereon at the rate of six percent per annum from the 9th day of June, 1908, until paid, and its cost herein expended, and for which an execution is awarded. Said judgment is credited by the sum of $1,700.00 sale of property as of date the 12th day of April, 1909, and any execution which issues on said judgment is ordered to be so endorsed. The grounds of attachment as against deft. Ed. L. Atkins, are sustained, but the levy of said attachment having been made on property adjudged to have been fraudulently conveyed, the same is now discharged. To all of which judgment of the Court, said deft., T. J. Atkins, objects and excepts, and prays an appeal to the Court of Appeals, which is granted.

J. C. SPEIGHT,
Special Judge.

A Copy.
Attest:
J. A. MILLER, *Clerk,*
By R. B. HAY, *D. C.*

EXHIBIT "B" WITH TRUSTEE'S REPORT & PETITION.

Court of Appeals of Kentucky.

FEBRUARY 8, 1910.

(Not to Be Reported.)

T. J. ATKINS' TRUSTEE et al., Appellants,
vs.
GLOBE BANK & TRUST CO. et al., Appellees.

J. T. ATKINS et al., Appellants,
vs.
GLOBE BANK & TRUST CO. et al., Appellees.

Appeals from McCracken Circuit Court.

Opinion of the Court by Judge Carroll.

In August, 1908, the Globe Bank & Trust Company filed its petition in the McCracken Circuit Court assailing a voluntary
23 conveyance made by T. J. Atkins, Sr., to his son T. J. Atkins and the children of his son, upon the ground that at the time he made the conveyance he was largely in debt to it and, therefore,

the conveyance was constructively fraudulent as to it and other antecedent creditors. It obtained an attachment which was levied upon the real estate conveyed by the deed. Afterwards other creditors of Atkins filed separate suits, seeking like relief, and obtained attachments which were levied upon the same property and finally all of these suits were consolidated. Within four months after the suit of the Globe Bank & Trust Company was filed, Atkins, upon the petition of some of his creditors, was adjudged a bankrupt, and under proceedings taken and had in the bankrupt court A. Y. Martin was appointed Trustee in Bankruptcy. Thereupon Martin filed his petition in the McCracken Circuit Court, setting up that the conveyance made by Atkins was fraudulent, and asked that it be set aside and the property adjudged to belong to the trustee of the bankrupt for the benefit of his creditors. He further asked that, as trustee, he be substituted as plaintiff in the various suits seeking to set aside this conveyance, and that the case proceed to judgment in his name as trustee and the proceeds of the sale of the property, if the conveyance was adjudged fraudulent, be paid over to him for distribution in the bankrupt court among the creditors of Atkins.

To these various suits the grantees in the deed filed an answer in which they denied that the conveyance was constructively fraudulent, or fraudulent at all; and averred that at the time it was made Atkins, the grantor, was not primarily indebted to any person and had a large estate in addition to that voluntarily given by him to his child and grand-children.

After this the creditors, by amended pleadings, set up that the deed made by Atkins, although dated December 3, 1906, was not in fact delivered to or accepted by the grantees until April 20, 1907. To this the grantees answered that the deed was in fact delivered to and accepted by them on December 4, 1906.

Upon final hearing the Court adjudged that the deed, although dated December 3, 1906, was not delivered to or accepted by the grantee until April 20, 1907, and further adjudged that the deed was without valuable consideration and constructively fraudulent as to antecedent creditors, and the attachments obtained by them were sustained and the property levied on ordered to be sold. It was further adjudged that as the conveyance was not actually fraudu-
ent, creditors whose debts were created after its execution
24 were not entitled to have it set aside for their benefit, but these creditors are not complaining of the judgment refusing to award them any interest in the attached property. The trustee in bankruptcy was appointed special commissioner to sell so much of the property as might be necessary, and he was directed to hold the proceeds "subject to the final orders of this court in the further and final disposition of such proceeds or subject to the District Court of the United States for the Western District of Kentucky in the matter of T. J. Atkins, bankrupt, now pending in such court under its final distribution of the entire assets of the estate of such bankrupt in the final adjustment and settlement of all of its affairs before such court in such proceedings now pending

therein in bankruptcy, and the rights of all creditors in such bankrupt proceedings in the distribution or disposition of such proceeds by the bankrupt court are hereby reserved and not determined but left open for final adjudications among them in such proceeding in bankruptcy."

Of this judgment the Trustee in Bankruptcy complains because the Court refused to substitute him as plaintiff instead of the attaching creditors in the actions for the recovery of the property, and in failing to adjudge that the consolidated action should proceed in his name as Trustee to recovery of the property, and in failing to adjudge that the consolidated action should proceed in his name as Trustee to recover the property for the benefit of the bankrupt's estate, and also in not expressly adjudging the Trustee entitled to the proceeds of the sale of the property for distribution among the creditors of the estate through the trustee.

The grantees in the deed complain,

First, Because the action was prematurely submitted;

Second, Because the lower court treated the deed as not delivered or accepted until April 20, 1907, when it should have been treated as delivered on December 4, 1906; and,

Third, Because the Court erred in holding the conveyance constructively fraudulent as to antecedent creditors.

Taking up first the questions raised by the Trustee in Bankruptcy, it seems to us that neither the failure of the Court to allow the action to be prosecuted in his name, nor the judgment entered, prejudiced substantially, or at all, his rights as Trustee for the benefit of the creditors. The bankruptcy statute in Section 70 invests the Trustee with the title of the bankrupt as of the date he was adjudged a bankrupt to all of his estate not exempt, including property transferred by him in fraud of his creditors, and gives him the right to recover property so disposed of. As the statute gives to the trustee the title to the property of the bankrupt and the right to *the right to* institute proceedings either in the bankrupt court or the State Court for its recovery, he has also the right, when authorized or permitted so to do by the bankrupt court, to be substituted as plaintiff in any suits brought by creditors of the bankrupt in the State Court for the purpose of recovering property fraudulently conveyed by the bankrupt and to which, or the proceeds thereof, the Trustee in Bankruptcy is entitled.

Anderson v. Anderson, 80 Ky., 638;
Martin v. Smith, 31 Ky. L. R., 882;
Moyer v. Dewey, 103 U. S., 28 L. ed., 394;
Clarke v. Larremore, 188 U. S., 486; 47 L. ed., 558.

In this case, however, there is serious question as to whether the trustee pursued in the manner pointed out in the order of the bankrupt court the course necessary to have himself substituted as plaintiff in the actions pending in the State Court. But, however this may be, it is manifest that the failure of the State Court to grant the request of the trustee did not in any manner prejudice his rights, as the judgment rendered in the action accomplished all

that the trustee could have secured if the action had been prosecuted in his name. It is true the trustee asked that the conveyance be declared fraudulent as to all creditors, both subsequent and antecedent, while the Court only adjudged that the conveyance was fraudulent as to antecedent creditors, but we do not understand that the Trustee in Bankruptcy is complaining of the judgment in so far as it refused to adjudge the conveyance actually fraudulent. The judgment does not undertake to dispose of the proceeds that may be realized from the sale of the property, but leaves this question open for future determination, and we do not doubt that when the Court comes to make an order concerning the disposition of the proceeds in the hands of the Trustee as Special Commissioner, it will direct that the proceeds be paid over to the Trustee in Bankruptcy to be administered as a part of the estate of the bankrupt in the bankruptcy court. In anticipation of what we assume the Court will do, we may, with propriety in this opinion, direct that it make such orders. If the Court in the judgment had undertaken to divert the Trustee of the control of this fund, we would upon this point reverse the judgment, with directions to proceed as indicated, but as the Court did not make such an order we are of
26 the opinion that on the appeal of the Trustee the judgment of the lower court should be affirmed.

On the appeal of the grantees in the conveyance, the first error assigned is, that the action was prematurely submitted for judgment. Some new pleadings were filed at the submission term by the persons attacking the conveyance; but as the issues raised by these pleadings were adjudged in favor of the grantees in the deed, their rights were not prejudiced by the submission so far as these new issues were concerned, hence they are not in any position to complain that the submission was premature. The issues as to the date the deed was delivered should have been made up long before the June Term, and, failing to do so, the grantees in the deed were in default. But this is not a matter of any consequence, as we are of the opinion that the deed was delivered on December 4, 1906. The evidence upon this point is, that on December 3, 1906, the grantor made, signed and acknowledged the deed and gave it to the attorney who wrote it to deliver to the clerk for record. On the following day the deed was lodged in the clerk's office and the tax paid, but for some unexplained reason it was not recorded until April 20, 1907. There is no suggestion that any of the parties to the deed had anything to do with the failure of the clerk to record it at the time it was lodged for record, or in seasonable time thereafter. This was due to oversight or negligence on the part of the Clerk. It is also true that the grantees, all of whom were infants except Ed Atkins, to whom a life estate was given, did not know that the deed had been executed or lodged for record until the day following its record. But we are of the opinion that the lodging of the deed for record in the proper office by the grantor was sufficient to constitute a delivery as of that date.

The general rule is, that a deed does not become operative until it has been delivered and accepted, or the grantee does some act

equivalent to an acceptance of it. But if the grantees, or any of them, are infants, and the deed is beneficial to them, it will be presumed they assented to it and its acceptance by them will date from the time it is delivered to the Clerk for record or placed in the hands of a third person to be delivered or recorded.

Akers v. Shoemaker, 31 Ky. L. R., 482;
Mullens v. Mullens, 120 Ky., 643;
Morrison v. Fletcher, 119 Ky., 488;
Bunnell vs. Bunnell, 111 Ky., 566.

On behalf of the grantees it is further argued that as Atkins, at the time the deed was made, was not liable except as
27 surety or endorser in any amount, or for any debts, and owned a large estate besides that voluntarily conveyed, the conveyance was not constructively fraudulent. Although the evidence shows that the indebtedness of Atkins in December, 1906, as principal, was trifling, it is nevertheless a fact that as endorser, surety and guarantor he had then assumed heavy obligations. Section 1907 of the Kentucky Statutes reads in part:

"Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate without valuable consideration therefor shall be void as to all his then existing liabilities."

Under this statute, every voluntary conveyance made by a person who is at the time liable for any debts, is constructively fraudulent as to such obligations, no matter whether they are fixed or contingent, or have been incurred as principal, or surety or endorser or guarantor.

Under the statute no person can give away property subject to his debts to the prejudice of his then existing creditors. The fact that he may at the time own and retain largely more than he gives, will not be allowed to defeat the operation of the statute. If what he has given away is needed to pay his debts, the property in the hands of the grantees can be subjected for this purpose. The very best evidence of the fact that a voluntary conveyance is constructively fraudulent as to antecedent debts is the fact that it becomes necessary to subject the property thus conveyed to pay the debts of the grantor.

Crook vs. Hume, 109 S. W., 364;
Trimble vs. Ratcliffe, 9 B. Mon., 511.

Upon the appeal of Ed. L. Atkins, and others, grantees, the judgment must be reversed for the error in fixing the delivery and acceptance of the deed as of April 20, 1907, instead of December 4, 1906.

To what extent this will effect the judgment creditors, we are not advised; but only those creditors whose debts were created previous to December 4, 1906, are entitled to participate in the proceeds realized from the sale of the property. If the proceeds amount to more than sufficient to pay such debts, the surplus should be paid to the grantees in the deed.

Wherefore the judgment on the appeal of the trustee in bank-

ruptcy is affirmed, and the judgment on the appeal of Atkins and others is reversed.

Bradshaw & Bradshaw, Hendrick & Corbett, J. D. Mocquot, for Appellants.

D. G. Park, for Appellees.

28 EXHIBIT "C" WITH TRUSTEE'S REPORT & PETITION.

McCracken Circuit Court.

Equity.

GLOBE BANK & TRUST CO., &c., Pl'ffs,
ag't
T. J. ATKINS, &c., Def'ts.

Consolidated Actions.

This day came plaintiffs in these consolidated actions and filed supplemental petiton herein, and also filed copy of opinion of the Court of Appeals herein. This day the following judgment was filed herein, viz: "The Court being advised under the mandates and opinion of the Court of Appeals herein filed and upon all the pleadings, exhibits and proof on file and proceedings had in these consolidated actions, the former judgment rendered herein on June 19th, 1909, by this Court is hereby modified in that it is now adjudged that the deed in controversy bearing date December 3rd, 1906, from T. J. Atkins to Ed L. Atkins, Elizabeth Atkins Graham, Edward Atkins, Grace Atkins and Elmonia Atkins for the lands and real estate fully described in the former judgment was delivered and duly executed on December 4th, 1906, instead of on April 20th, 1907; and it is now further adjudged that such deed is without any valuable consideration and voluntary and constructively fraudulent and void as against the debt of the Globe Bank & Trust Company in the sum of only $9,000.00, with interest from the 16th day of October, 1908, at six per cent interest per annum until paid and its cost herein expended, for which amount only a trust is hereby declared in such property and its proceeds for the payment of such amount of its debt, interest and cost and as to which such deed is hereby set aside and held for naught, and the Globe Bank & Trust Company's attachment levied on such property therefor is hereby sustained; but as to the balance of such judgment debt in favor of the Globe Bank & Trust Company amounting to $1,285, with interest from the 16th day of October, 1908, at six per cent per annum until paid it is now adjudged that such deed is valid because this latter part of such debt was created after the execution of such deed.

It is further adjudged that the judgment debt therein adjudged in favor of the Old State National Bank of Evansville, Indiana, for Five Thousand and Twelve Dollars ($5,012.00), with six per cent

interest from the 29th day of September, 1908, until paid was created prior to the execution of such deed on December 4th, 1906, and that the trust declared by the former judgment in the property therein described and its proceeds for the payment of such
29 debt and interest and cost is hereby adjudged because of the creation of such debt prior to the execution of the deed; and the deed in controversy from T. J. Atkins to Ed L. Atkins, Elizabeth Atkins Graham, Edward Atkins, Grace Atkins and Elmonia Atkins is without valuable consideration and constructively fraudulent and void as against such debt; and the deed aforesaid as to such debt, interest and cost is hereby set aside and held for naught.

It is further adjudged that the judgment debt in the former judgment in favor of the First National Bank of Paducah, Kentucky, for ($6,000.00) Six Thousand Dollars, with interest from the 16th day of October, 1908, was created prior to the execution of such deed on December 4th, 1906, and that the trust therein declared in the property therein described and its proceeds for the payment of such judgment debt and interest and cost is hereby adjudged because of its creation prior to the deed; and that the deed in controversy from T. J. Atkins to Ed L. Atkins, Elizabeth Atkins Graham, Edward Atkins, Grace Atkins and Elmonia Atkins is without valuable consideration and constructively fraudulent and void as against such debt and interest and cost; and the deed aforesaid as to such debt is hereby set aside and held for naught.

But it is now further adjudged that all other debts sued on in any of these consolidated actions by the plaintiffs therein were created subsequent to the execution of the deed in controversy on December 4th, 1906; and that as to all of such debts so sued on in any of these consolidated actions, and as to all other debts against T. J. Atkins which were created subsequent to the execution of the deed aforesaid in controversy on December 4th, 1906, which, it is adjudged, were represented in these consolidated actions by Arthur Y. Martin, Trustee in Bankruptcy for T. J. Atkins, bankrupt, and in the former judgment such deed is not fraudulent but is valid as provided and adjudged in the former judgment rendered in the consolidated actions on June 19th, as aforesaid, and that no trust for the payment of any of such debts so created subsequent to the deed is herein declared or adjudged.

It is now further adjudged that the proceeds arising from the sale of the property described in the former judgment rendered June 19th, 1909, aforesaid, shall be held by Arthur Y. Martin, Trustee, and as Special Commissioner of this Court under the terms and directions of such former judgment until disposed of and distributed as is directed in such judgment."

30 A copy. Attest:

J. A. MILLER, *Clerk*,
By L. P. PALMER, *D. C.*

Proof of Claim of Globe Bank & Trust Company of Paducah, Ky., is as follows:

In the District Court of the United States for the Western District of Kentucky.

In the Matter of T. J. ATKINS, Bankrupt.

STATE OF KENTUCKY,
County of McCracken, ss:

On the 9th day of January, A. D. 1909, came N. W. Van Culin, of ——, in the county of McCracken, State of Kentucky, and made oath and says that he is Cashier of the Globe Bank & Trust Company, which is a corporation duly incorporated under the banking laws of the State of Kentucky, and that T. J. Atkins, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said corporation in the sum of Ten Thousand Two Hundred and fifty dollars ($10,250.00); that the consideration of said debt is as follows: money loaned by the said bank to him and others upon notes executed by and discounted by the bank and at various times renewed; and action is pending in the McCracken Circuit Court on such notes filed Aug. 25, 1908, under which a lien is acquired and held on the real estate therein described attacking a deed as fraudulent; that no part of said debt has been paid; that there are no set-offs or counter claims to the same, and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever except 3 collateral notes executed by Donald Bros. Mercantile Company of New Hebron, Miss., to Starks Ullman Saddlery Co. and transferred as collateral by such company to the bank; and also as stated below; and that no note has been received for said account nor has any judgment been rendered thereon except the following notes: Note of June 4, 1908, due 4 months, $3,000.00; note May 16, 1908, due 4 months, $2,000; Note May 4, 1908, due 4 months, $1,500; Note July 16 1908, due 3 months, $1,500; Note Aug. 10, 1908, due 30 days, $1,750; Note May 16th, 1908, on demand, $500.00, the latter secured by collaterals aforesaid.

N. W. VAN CULIN.

31 *General Letter of Attorney in Fact by Creditor.*

To D. G. Park, attorney-at-law, Paducah, Ky.; —— ——, President:

I, G. W. Robertson, of Paducah, Ky., in the County of McCracken and State of Kentucky, do hereby authorize you, or any of you, to attend any meeting of creditors of the bankrupt, or other meeting in said bankruptcy, advertised or directed to be held in the court of bankruptcy, at any place or time appointed by the court of bankruptcy, or any adjournment thereof, and then and there, for and in my name to vote for or against any proposal or resolution

or other action than may then be submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the bankrupt's estate, and for its assent to the appointment of such trustee, and with like power to attend and vote at any meeting of creditors or sitting of court which may be held for any purpose; also to accept any composition proposed by the bankrupt in satisfaction of his debts; and to receive payment of dividends or money due it under any composition, and for any other purpose in its interest whatsoever, with full power of substitution.

In Witness Whereof, I hereunto sign my name with Bank's official seal affixed thereto this 9th day of January, A. D. 1909.

[BANK'S SEAL.] G. W. ROBERTSON, *Pres.*

Signed, sealed and delivered in the presence of—
[SEAL.] W. J. PIERCE.

STATE OF KENTUCKY,
County of McCracken, ss:

Acknowledged before me this 9th day of January, A. D. 1909, by G. W. Robertson, President, — to me to be the person who executed the same.

[L. S.] W. J. PIERCE,
Notary Public.

My commission expires Feb. 23, 1910.

Endorsed on the back as follows: In the District — of the United States for the — District of ——. In the Matter of Thomas J. Atkins, Bankrupt. Proof of Claim of Globe Bank & Trust Co., Paducah. Amount, $10,250.00. Filed this Ninth day of January, A. D. 1909, at 12 o'clock A. M. Emmet W. Bagby, Referee."

Proof of Claim of Old State Bank of Evansville, Ind., is as follows:

In the District Court of the United States for the Western District of Kentucky.

32 In the Matter of THOMAS J. ATKINS, Bankrupt.

STATE OF KENTUCKY,
County of McCracken, ss:

On the 17th day of March, A. D. 1909, came H. H. Ogden, of Evansville, in the County of Vanderburg, State of Indiana, and made oath and says that he is Cashier and Treasurer of The Old State National Bank of Evansville, Ind., which is a National Banking Association, the person against whom a petition for adjudication has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said Bank in the sum of Five Thousand Dollars ($5,000.00); evidenced by 3 notes, copies of

which will be filed herewith; that the consideration of said debt is as follows: Money loaned upon the endorsement of T. J. Atkins; that no part of said debt has been paid; that there are no set-offs or counter claims to the same; and that said Bank has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever, and that notes were executed in evidence of said indebtedness.

H. H. OGDEN.

Subscribed and sworn to before me this — day of March, A. D. 1909.

[L. S.] GRAHAM F. DENBY,
Notary Public, Vanderburg County, Indiana.

My commission expires October 5, 1909.

General Letter of Attorney in Fact by Creditor.

To Chas. K. Wheeler, D. H. Hughes, & W. A. Berry, Paducah, Ky.:

The Old State National Bank of Evansville, in the County of Venderburg and State of Indiana, do- hereby authorize you, or any of you, to attend any meeting of creditors of the bankrupt, or other meeting in said bankruptcy, advertised or directed to be held in the court of bankruptcy, at any place or time appointed by the court of bankruptcy, or any adjournment thereof, and then and there, for and in its name to vote for or against any proposal or resolution or other action that may then be submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the bankrupt's estate, and for its assent to the appointment of such trustee, and with like power to attend and vote at any meeting of creditors or sitting of court which may be held for any purpose; also to accept any composition proposed by the bankrupt in satisfaction of his debts; and to receive payment of dividends or
33 money due it under any composition, and for any other purpose in its interest whatsoever, with full power of substitution.

In witness whereof, we hereunto sign our name with our official seal affixed hereto, this 17th day of M'ch A. D. 1909.

OLD STATE NAT'L BANK EVANSVILLE.
H. H. OGDEN, *Cas.*

Sipned, sealed and delivered in the presence of—

[L. S.] GEO. L. DAUM.

STATE OF INDIANA,
County of Vanderburg, ss:

Acknowledged before me this 17th day of March, A. D. 1909, by H. H. Ogden, Cashier of the Old State National Bank of Evans-

ville, Ind., personally known to me to be the person who executed the sale.

GRAHAM F. DENBY,
Notary Public.

My commission expires Oct. 5, 1909.

STATE OF INDIANA,
County of Vanderburg, ss:

Personally came H. H. Ogden, who executed the foregoing instrument on behalf of The Old State National Bank, and made oath that he is Cashier of the Old State National Bank of Evansville, Ind.

H. H. OGDEN.

Subscribed and sworn to before me this 17th day of March A. D. 1909.

[SEAL.] GRAHAM F. DENBY,
Notary Public.

Endorsed on back as follows: "In the District Court of the United States for the —— District of ——. In the Matter of Thos. J. Atkins, Bankrupt. Proof of Claim of Old State National Bank, Evansville. Filed this Eighteenth day of March, A. D. 1909, at 11 o'clock A. M. Emmet W. Bagby, Referee."

Proof of Claim of the First National Bank of Paducah, Ky., is as follows:

In the District Court of the United States for the Western District of Kentucky.

In the Matter of T. J. ATKINS, Bankrupt.

34 STATE OF KENTUCKY,
County of McCracken, ss:

On the 9th day of Jan'y A. D. 1909, came Dow Wilcox, of Paducah, in the County of McCracken, State of Kentucky, and made oath and says that he is Assistant Cashier of First National Bank of Paducah, and that T. J. Atkins, the person against whom a petition for adjudic-tion of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said corporation in the sum of Six thousand dollars ($6,000.00); that the consideration of said debt is as follows: Money loaned to Starks-Ullman Saddlery Co. and the notes endorsed by said T. J. Atkins, same are filed herewith, marked A & B, that no part of said debt has been paid; that there are no set-offs or counter claims to the same, and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever, and that no judgment has been rendered thereon.

DOW WILCOX.

Subscribed and sworn to before me this 9th day of Jan'y A. D. 1909.

J. D. MOCQUOT,
Notary Public, McCracken County, Kentucky.

My commission expires Jan'y 23, 1912.

General Letter of Attorney in Fact by Creditor.

To J. D. Mocquot, Paducah, Ky.:

I, First National Bank, of Paducah, in the County of McCracken and State of Kentucky, do hereby authorize you, or any of you, to attend any meeting of creditors of the bankrupt, or other meeting in said bankruptcy, advertised or directed to be held in the court of bankruptcy at any place or time appointed by the court of bankruptcy, or any adjournment thereof, and then and there, for and in its name to vote for or against any proposal or resolution or other action that may then be submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the bankrupt's estate, and for it, assent to the appointment of such trustee, and with like power to attend and vote at any meeting of creditors or sitting of court which may be held for any purpose; also to accept any composition proposed by the bankrupt in satisfaction of his debts; and to receive payment of dividends or money due it under any composition, and for any other purpose in its interest whatsoever, with full power of substitution.

35 In witness whereof, I hereunto sign my name with my official seal affixed hereto this 9th day of Jan'y A. D. 1909.

FIRST NATIONAL BANK OF PADUCAH,
By ROBT. L. REEVES, *Pres't.*

Signed, sealed and delivered in the presence of—
DOW WILCOX.

STATE OF KENTUCKY,
County of McCracken, ss:

Acknowledged before me this 9th day of Jan'y A. D. 1909, by R. L. Reeves, personally known to me to be the person who executed the same.

DOW WILCOX,
N. P., M. C.

My commission expires January 23, 1912.

STATE OF KENTUCKY,
County of McCracken, ss:

Personally came R. L. Reeves, who executed the foregoing instrument on behalf of First National Bank of Paducah, and made oath that he is Pres't of said Bank and duly authorized to act.

ROBT. L. REEVES.

Subscribed and sworn to before me this 9th day of Jan'y A. D. 1909.

DOW WILCOX,
N. P., M. C.

My commission expires January 23, 1912.

Notes above referred to are as follows, to-wit:

Ex. A.

$1,500.
Protest fees $2.33.

PADUCAH, KENTUCKY, *June* 1, 1908.

Four Months after date we promise to pay to the order of O. B. Starks Fifteen hundred Dollars, value received. Negotiable and payable at the First National Bank, Paducah, Kentucky.

STARKS ULLMAN SADDLERY CO.,
Per O. B. STARKS, *Pres. & Treas.*

No. 53,031.
Due Oct. 1-08.
Postoffice.

Endorsed on back as follows: O. B. Starks, Geo. C. Thompson, T. J. Atkins. Copy.

PADUCAH, KENTUCKY, *July* 20, 1908.

Ex. B.

$4,500.
Protest fees $2.33.
Three Months after date we promise to pay to the order of O. B. Starks Forty-five hundred Dollars, value received. Negotiable
36 and payable at the First National Bank, Paducah, Kentucky.

STARKS ULLMAN SADDLERY CO.,
Per O. B. STARKS, *Pres. & Treas.*

No. 53,491.
Due Oct. 20-08.
Postoffice.

Endorsed on back as follows: O. B. Starks, Geo. C. Thompson, T. J. Atkins. Copy.

Endorsed on back as follows: "In the District Court of the United States for the —— District of ——. In the Matter of T. J. Atkins, Bankrupt. Proof of Claim of First National Bank, Paducah, Ky., Amount, $6,000.00. Filed this 9th day of January, A. D. 1909, at 9 o'clock A. M. Emmet W. Bagby, Referee."

The Petition of the Globe Bank & Trust Company is as follows:

In the United States District Court for the Western District of Kentucky.

In Bankruptcy.

In the Matter of T. J. ATKINS, Bankrupt.

In this proceeding, the petitioner, Globe Bank & Trust Company, comes and says it is a banking corporation duly incorporated and organized under the laws of the State of Kentucky, with power to sue and be sued, make contracts and to do a general banking business, including the transactions alleged in its corporate name, which is the Globe Bank & Trust Company, and it was such corporation at the time of the transactions herein alleged. It now says it is the same person who under such corporate name has also filed its claim before the Referee, duly proven as required by the National Bankruptcy Law of the United States to which claim it here refers and which it makes by such reference a part of this petition.

Your petitioner further says that the statement in the letter, Exhibit "D" of T. J. Atkins, filed with the original petition of the petitioning creditors herein, is not true or correct in its statement that he has no property except a life estate of no considerable
37 value in some real estate for it says that as against this petitioner he does not own any life estate at all in such property, but owns in fee for the purpose of paying petitioner's debts; and it further says that his indebtedness is not accurately or correctly set out in such letter.

Petitioner now applies by this petition to this Court and its Referee to protest against and object to the jurisdiction of this Court to determine or adjudicate the questions involved concerning the real estate of T. J. Atkins, bankrupt, sought to be subjected by it in proceedings which it has instituted in the McCracken County Circuit Court in the State of Kentucky, to subject such property to the payment of its debts. Petitioner says that on the 25th day of August, 1908, it duly filed in the Clerk's office of the McCracken Circuit Court in McCracken County, Kentucky, its petition in equity against T. J. Atkins, Ed. L. Atkins, Elizabeth Graham Atkins, Edward Atkins, Elmonia Atkins and Raleigh Graham, husband of Elizabeth Atkins Graham, in which it duly averred the debts owing to it by T. J. Atkins in due form and that such debts existed prior to the 3rd day of December, 1906; that on such date the defendant named therein, T. J. Atkins, had fraudulently executed a deed of conveyance to the other defendants therein namd, who are the parties aforesaid; that Ed. L. Atkins was his son, and Elizabeth Atkins Graham, Edward Atkins, Grace Atkins and Elmonia Atkins were his grand-children by such son; and that such deed of conveyance was fraudulent and without any valuable consideration therefor whatever from such parties to whom he so conveyed it; that he had caused such deed to be recorded in the Clerk's office of the McCracken County Court, but not until April 20th,

1907, where such deed is now so of record, and that this deed was so made and executed by him with the fraudulent purpose and intent on his part to hinder and delay his creditors in the collection of their debts, including the debts of this plaintiff therein alleged; and that such deed of conveyance has been made without any valuable consideration whatever since the original creation of the greater part of the debts alleged and therein sued for, and that such deed is absolutely void. But petitioner says that such conveyance was executed and recorded for more than four months before the proceedings in bankruptcy herein were instituted by the petitioning creditors, and he thereby fraudulently conveyed to the parties alleged large and valuable parcels of real estate situated in McCracken County, Kentucky. Petitioner says it caused a
38 general attachment to be issued on its petition in the State Court aforesaid and to be duly levied upon the real estate so conveyed, and such attachment is now pending, undertermined.

It further says that it fully described the real estate so conveyed by such deed in its petition by metes and bounds and sought therein to have a trust declared in so much of such property as was necessary to pay its debts in its favor, and that the deed be declared void as against it to the extent of its debts. Petitioner says process was duly issued in such action on the 25th day of August, 1908, and duly served by the Sheriff of McCracken County, Kentucky, on T. J. Atkins on August 26th, 1908, and the process of attachment was duly levied by such Sheriff on all the real estate alleged on August 25th, 1908; and on the same day it caused due notice thereof, with a full description of the real estate described in the petition, to be duly filed and recorded in the Clerk's office of the McCracken County Court in McCracken County, Kentucky. Afterwards, on October 7th, 1908, the defendant therein, T. J. Atkins, ap-eared by his attorney and filed by orders of court a general demurrer to the petition and also his answer to such petition without waiving the demurrer. Afterwards on October 17th, 1908, plaintiff therein, by leave of court, filed its amended petition and on November 14th, 1908, filed its demurrer to the answer which was in part sustained by the order of the McCracken Circuit Court, and on December 1st, 1908, plaintiff therein, by order of court, filed its reply to the answer of T. J. Atkins. The other defendants therein named were proceeded against as non-resident defendants by process of warning order duly made in such action, and the appointment of attorney in regular form, whose report as such non-resident attorney is now on file in action without having been employed by the other defendants who have never entered their personal appearance in the action and its action is now still so pending in the McCracken Circuit Court in such condition and was so when the petition in bankruptcy was instituted. Petitioner here files a complete copy of all of the pleadings aforesaid in such action and refers to them and makes them a part of this petition as Exhibit "A" in order that the Court may determine the nature of the issues involved in such action; and it also refers to the description of the property sought to be subjected in the setting aside of such fraudulent conveyances

as same is particularly described in its petition, a copy of which is so filed and made a part of, and by reference it makes such description a part of this petition, all of which is located in Mc-
39 Cracken County, Kentucky, and the same in which the bankrupt claims only a life estate.

Petitioner, Globe Bank & Trust Company, now avers that neither this Court or the Referee has jurisdiction to hear or determine the issues involved in such action; and it further avers that neither this court or its Referee has any power or jurisdiction to hear or determine or adjudicate any issues in any proceeding for the setting aside of such deed for the benefit of this petitioner as a creditor, or for any other creditor because such conveyance was executed and recorded for a period of more than four months before this proceeding in bankruptcy was instituted, and it now objects to any effort of this Court to entertain or exercise any jurisdiction upon such issues. But it prays the Court and its Referee to permit and to direct its Trustee to allow the use of his name to be joined with this petitioner as a co-plaintiff in the action herein alleged so pending in the State Court for the prosecution of such action to a final judgment in the State Court upon the issues therein involved, and that this petitioner be permitted to use the name of the Trustee as a co-plaintiff with it for such purpose, and that it be permitted to prosecute such action by its own attorney in the name of such Trustee with its own.

It further says that other actions are pending by other creditors, whose debts were created subsequent to its debts in the same State Court, and the rights between this petitioner and such other creditors are involved in such litigation, and it asks that these matters also be permitted to proceed to trial and judgment in the State Court.

Wherefore, petitioner prays the judgment of this Court that it decline to entertain or exercise any jurisdiction of such matters and that it permit and direct its Trustee to join as co-plaintiff with this petitioner in the prosecu-ion of such action in the State Court; and it prays that its right and equities acquired in such action be thus fully protected by this Court; and for all necessary and proper relief for such purpose.

It further says the petitioning creditors in bankruptcy herein are creditors whose debts were created subsequent to the conveyance and the recording of it alleged and they had full knowledge of its existence within four months after it was executed and recorded and created such debts notwithstanding such knowledge; that the petitioner, Owen, is a near relative of the bankrupt; that the petitioner, American-German National Bank, is a creditor bank of which the bankrupt is Vice-President, and in which he is a Director,
40 and in which also he was a large stockholder at the time of such conveyance; and that the Mechanics & Farmers Bank is a creditor also who was permitted, and still permits, the use of its name as a petitioning creditor under the influence and direction of the American-German National Bank, and the creditor, Owen, by their attorneys through whom the involuntary petition was filed, and it charges that the petition in bankruptcy was so filed through the procurement of T. J. Atkins, the bankrupt, in collu-

sion with them; and it says their action so taken was so procured with the view of obstructing and delaying the prosecution of the petitioner's action aforesaid pending in the State Court as alleged, and for this further reason it prays that this Court and its Referee shall not in any manner interfere with the prosecution or management of such action by it in the State Court.

GLOBE BANK & TRUST COMPANY,
By D. G. PARK, *Attorney.*

The affiant, G. W. Robertson, says he believes the statements contained in the foregoing petition are true.

G. W. ROBERTSON.

Subscribed and sworn to before me by G. W. Robertson, this the 13th day of January, 1909.

[L. S.] W. J. PIERCE,
Notary Public.

My commission expires Feb. 23, 1910.

And on February 18, 1909, the following proceedings were had:

United States District Court, Western District of Kentucky.

In the Matter of T. J. Atkins, Bankrupt.

Order.

The petition of the Globe Bank and Trust Company, filed herein on the 20th day of January, 1909, coming on to be heard, was argued by D. G. Park, Esq., counsel for said petitioner, and by Arthur Y. Martin, Esq., the Trustee of the bankrupt, in person and the Court being advised delivered an opinion in writing which is filed, and upon the grounds therein stated it is ordered, adjudged and decreed—

First. That any right or lien acquired by attachment, lis pendens, or otherwise, upon any property or interest of the bankrupt in the action pending in the McCracken Circuit Court, styled Globe
41 Bank and Trust Company vs. T. J. Atkins and others, and described in the petition now under consideration, be, and the same shall, until the further order of the Court herein, be preserved for the benefit of the bankrupt's estate as provided in Section 67*f* of the Bankruptcy Act.

Second. That the said Trustee, either on his own motion (if so advised), or by the direction of the Referee or the creditors, may apply to said McCracken Circuit Court for leave to be made a party to said action for the purpose of making such lien or right available for any creditors of the bankrupt who may hereafter show a right to share in any funds that may arise from enforcing said lien or other rights, if any, which were acquired in said action in the State Court; or,

Third. If the said Trustee shall be so advised, or if the creditors

of the bankrupt shall so desire, he may apply to this Court for leave to have these orders set aside and the said lien or other right abandoned if he shall deem it better to bring an independent suit in respect to the property described and impleaded in the said action in the McCracken Circuit Court; or,

Fourth. If so advised, said Trustee may hereafter make application to have the said suit in the McCracken Circuit Court stayed under Section 11 of the Act.

The Opinion above referred to is as follows:

United States District Court, Western District of Kentucky.

In the Matter of T. J. ATKINS, Bankrupt.

Opinion.

On January 20th, 1909, the Globe Bank and Trust Co. filed a petition herein, setting up the fact that on August 25th, 1908, it had instituted an action in the McCracken Circuit Court against the Bankrupt and others, and had therein sought certain relief which it stated. It shows that it had sued out in that action an attachment which was levied upon certain real estate. The petitioner prays the Court to order that any lien or right acquired by it by the institution of that suit, or by the levy of the attachment therein, shall be preserved for the benefit of the estate. The petition in bankruptcy in this proceeding was filed December 19th, 1908, which was within four months after the filing of the suit in the State Court, and the attachment or other judicial lien in favor of the petition acquired by its suit were nullified under Section 67 of the Act, unless upon "due notice" the Court shall order otherwise. What the "due notice" required is, the Act does not prescribe, but as the Trustee,
42 A. Y. Martin, was notified and appeared, we shall assume that, for the purposes of this petition, due notice has been given. The adjudication was made on December 29th. Though we have not been furnished with the exact date, we may assume that the Trustee was appointed not far from January 15th, 1909. On January 20th, as we have seen, the pending petition was filed by the Globe Bank and Trust Company. The Trustee says that he has not yet had time to fully look into and consider these matters, and we suppose that such is the fact. Whether a creditor, until his claim is proved and allowed, may properly be heard upon such a question, or whether any person except the Trustee can properly ask such an order, we do not decide, though we suppose that any creditor whose claim has been proved and allowed, as well as the Trustee, may do so. What we have concluded is, that no harm can come from granting the petition at least temporarily, so as to preserve any possible benefits until the Trustee or the creditors or the Referee shall have been able to conclude whether it is better to stay the suit in the State Court under Section 11, or to take advantage under Section 67*f* of any lien or right acquired in the State Court

proceeding. It is probably better to do this in a temporary way than to leave the matter entirely open. An order upon the lines indicated will be entered.

WALTER EVANS, *Judge.*

Feb. 18th, 1909.

Order of Referee authorizing Trustee to institute action is as follows:

In the District Court of the United States for the Western District of Kentucky.

In Bankruptcy.

In the Matter of THOMAS J. ATKINS, Bankrupt.

Now comes A. Y. Martin, Trustee of the bankrupt's estate herein, by his attorney-, Bradshaw & Bradshaw and J. D. Mocquot, and files herein his petition for leave to file suit to recover certain property therein claimed to belong to the estate of the bankrupt, and asking for an order to be made in conformity with the authority given therefor by order of the District Court, heretofore made herein, directing the Trustee to institute action in the McCracken Circuit Court to recover said property, authorizing him to institute such action and have himself as trustee substituted as plaintiff in the action already instituted for the recovery of said property.

43 And the Referee having examined said order of the District Court referred to in said petition, and being sufficiently advised with reference thereto, it is now ordered that said Trustee be, and he is hereby, authorized to institute such action in the McCracken Circuit Court, and to have himself substituted as plaintiff in any actions that may have heretofore been instituted in said court by creditors of the bankrupt's estate for the recovery of said property, or to institute such action in any other court having jurisdiction thereof that he may deem proper.

Witness my hand this the 8th day of April, 1909.

EMMET W. BAGBY,
Referee in Bankruptcy.

The Supplemental Petition of the Globe Bank & Trust Company is as follows:

In the District Court of the United States for the Western District of Kentucky.

In Bankruptcy.

In the Matter of THOMAS J. ATKINS, Bankrupt.

Supplemental Petition by the Globe Bank & Trust Co.

The petitioner, Globe Bank & Trust Co., supplementing all of its petitions heretofore filed herein, now says since its former supple-

mental petition was filed the judgment therein referred to, rendered June 19th, 1909, in the McCracken Circuit Court in the consolidated actions, in its former petitions has been reversed in part and affirmed in part, on appeal, by the Court of Appeals of Kentucky under mandate and an opinion duly rendered from such Court of Appeals. The mandate and opinion were duly filed and on March 31st, 1910, judgment was duly rendered in the McCracken Court, modifying the former judgment in accordance with the mandate and opinion aforesaid, and such judgment has never been in any manner modified, vacated or reversed; and the judgment of such court therein rendered on June 19th, 1909, aforesaid has never been vacated, modified or reversed except as so directed in the mandate and opinion of the Court of Appeals of Kentucky, and so adjudged in the judgment aforesaid rendered March 31st, 1910, and in other respects it is affirmed and in full force. Petitioner says copies of both these judgments and copy of the opinion of the Court of Appeals of Kentucky rendered are set forth and filed as exhibits in the report of Author Y. Martin, Trustee, on file herein, and it here refers to such copies as there filed and makes them a part of this supplemental petition.

44 Petitioner further says that in all consolidated actions in which such judgments were rendered in the McCracken Circuit Court, except the action in favor of the old State National Bank of Paducah, this petitioner, as a party therein, duly filed pleadings in which it plead that its debt was created prior to the execution of the deed in controversy; and that all other debts, except the debts in favor of the old State National Bank of Evansville, Ind., and the First National Bank aforesaid, were created subsequent to the execution of such deed; and it therein denied the existence of actual fraud in the execution of such deed; and issue was duly joined thereon in such consolidated actions, including the action by Author Y. Martin, Trustee, in so far as it applied to or represented subsequent creditors. Petitioner now says that by the judgments of the McCracken Circuit Court aforesaid, rendered June 19th, 1909, and March 31st, 1910, it was adjudged that the debt in favor of petitioner, the Globe Bank & Trust Co., to the extent of $9,000.00, with interest from the 16th day of Oct., 1908, at six per cent per annum until paid and its costs therein expended; and the debt in favor of the old State National Bank of Evansville, Ind., for $5,012.00, with six per cent interest from the 28th day of Sept., 1908, until paid, and its costs; and the debt in favor of the First National Bank of Paducah for $6,000.00, with six per cent from the 16th day of Oct. 1908, until paid, and its costs, were all created prior to the execution of the deed in controversy; and that as to such debts, the deed was without valuable consideration, voluntary and constructively fraudulent and void; and the deed as to such debts was thereby set aside and held for naught. But it was thereby further adjudged that all other debts were created subsequent to the execution of the deed in controversy, and that as to all of such debts against T. J. Atkins created subsequent to the execution of such deed in controversy sued on by plaintiffs therein, or represented in the action of Arthur

Y. Martin, Trustee in Bankruptcy, consolidated therewith, such deed was not fraudulent or void, but was valid as provided and adjudged in the judgments aforesaid rendered on June 19th, 1909, and March 31st, 1910; and that no trust for the payment of any of such debts so created subsequent to the deed was declared or adjudged; but only the creditors whose debts were created previous to Dec. 4th, 1906, are entitled to participate in the proceeds realized from the sale of the property recovered, and that all creditors whose debts were created subsequent to such deed have no interest whatever in such proceeds.

Petitioner says the issues duly formed in the consolidated
45 actions concerning the validity of the deed and the existence of actual fraud were thus adjudged against all the subsequent creditors of T. J. Atkins whose debts were created after Dec. 4th, 1906; and all debts proved and filed before, or allowed by the Referee herein were created subsequent to Dec. 4th, 1906, and have no interest whatever in the proceeds recovered by setting aside the fraudulent deed in controversy except the Globe Bank & Trust Co., and the old State Bank of Evansville, Ind., and the First National Bank of Paducah, whose debts, as aforesaid, were created prior to such deed.

Petitioner further says under the order of this court by its Referee the issues concerning the lease executed by the Rhodes-Burford Company to T. J. Atkins and transferred by him to the American-German National Bank were referred to McCracken Circuit Court of adjudication as incidental to its jurisdiction in the execution of its judgments rendered as aforesaid, and pending such issues . the McCracken Circuit Court a written agreement of compromise was duly executed and filed therein by which it was agreed that the American-German National Bank shall have the rents under the lease for a period of two years from the date of confirmation of the report of the sale by order of the State Court in the consolidated actions; and the American-German National Bank therein surrendered and transferred such lease to the Globe Bank & Trust Co. and others as purchasers under the sale of the remainder of the terms of the lease in all other respects, and with all rights as set forth in the lease; and the American-German National Bank also therein released and abandoned all claim to pro rate in any manner in the proceeds realized from the sale of the property in the consolidated actions for any debts or demands owing to or claimed to be owing to such bank, no matter when created or how incurred, unless this Court shall finally adjudge that the three prior creditors named in the judgment setting aside the deed are not entitled to priority over subsequent creditors and distribute all the funds among the general creditors; and this written agreement was duly approved in writing by Arthur Y. Martin, Trustee in Bankruptcy for T. J. Atkins, bankrupt, endorsed on the back thereof and duly signed by him as Trustee; and thereupon the sale was duly confirmed by the order and judgment of the McCracken Circuit Court, and this order has never been in any manner modified, vacated or reversed. A copy of such agreement is on file as an exhibit in the Trustee's report herein and is here referred to and made a part hereof.

46 Petitioner now says by such agreement the American-German National Bank released all right and claim to participate in any manner in the distribution of the funds or proceeds realized from the sale of the property recovered by setting aside the fraudulent deed in controversy in favor of the three creditors aforesaid whose debts were created prior to the execution of such deed. Petitioner further says that all these proceedings in the State Court alleged were had and adjudged under the order and permission of this Court made by Hon. Walter Evans, Judge of this court, duly rendered herein Feb. 18th, 1909, on its petition filed Jan. 20, 1909; and the McCracken Circuit Court aforesaid had full power and jurisdiction to entertain, hear, determine and adjudge all such matters as set forth by its judgments herein alleged; and the American-German National Bank and other petitioning creditors, and Arthur Y. Martin, Trustee, in so far as he represents all creditors whose debts were created subsequent to Dec. 4th, 1906, and all creditors who were plaintiffs in such consolidated actions, and whose debts were created subsequent to such deed, are precluded and forever barred by such judgments so rendered in the McCracken Circuit Court aforesaid from claiming or receiving any part of the proceeds from the sale of the property sold under such judgments; and petitioner now prays that this Court so adjudge; and that all such proceeds be adjudged to and distributed pro rata among the Globe Bank & Trust Co., the old State National Bank of Evansville, Ind., and the First National Bank of Paducah, and they pray that this Court direct its Trustee, Arthur Y. Martin, to join as Trustee in Bankruptcy of T. J. Atkins, Bankrupt, in the deeds to be made by him as Special Commissioner under the judgments in the State Court in order to convey the property so sold to the purchasers as set forth in his report in confirmation of the title conveyed by him as Special Commissioner under the judgment of the State Court; and it prays for all other necessary and proper relief.

GLOBE BANK & TRUST CO.,
By D. G. PARK, *Att'y.*

Affiant, N. W. Van Culin, says he was, and for the purpose of winding up its affairs is, Cashier of the Globe Bank & Trust Co., and he says the statements in the foregoing supplemental petition are true.

N. W. VAN CULIN.

Sworn to before me by N. W. Van Culin, this May 12, 1910.

47 [SEAL.] W. J. PIERCE,
Notary Public,
Notary Public, *McCracken County, Ky.*

My commission expires Feb. 11, 1914.

The Supplemental Petition of the First National Bank is as follows:

In the District Court of the United States for the Western District of Kentucky.

In Bankruptcy.

In the Matter of T. J. ATKINS, Bankrupt.

Petition and Amended and Supplemental Proof of Claim of the First National Bank of Paducah, Ky.

Comes the First National Bank of Paducah, and with leave of this court files this, its petition, and hereby amends and supplements the proof of its claim against T. J. Atkins, bankrupt.

The said petitioner, First National Bank of Paducah, states that it obtained a judgment in the McCracken Circuit Court against T. J. Atkins in the sum of Six Thousand Dollars, with interest thereon from the 16th day of Oct., 1908, and that no part of said debt has been paid.

The petitioner further states that on the 9th day of January, proof of this claim was filed in this proceeding, and in said proof it was stated that it had no security for the payment of said claim; but this petitioner states that since the original proof of claim was filed in this proceeding, both the McCracken Circuit Court and the Court of Appeals of Kentucky have determined that petitioner has as security upon its claim upon certain real estate ... the city of Paducah, and being the same real estate referred to in the report of the Trustee in Bankruptcy of T. J. Atkins, to-wit:

Arthur Y. Martin, as the property sold by him under decree of the McCracken Circuit Court, and which report is here referred to for a more particular description of said property.

Now your petitioner further states that as security of its said claim $6,000.00, with interest from the 16th day of Oct., 1908, it has a lien upon the property just hereinbefore referred to, which lien is of equal dignity with that of the Globe Bank and Trust Company, and also that of the Old State National Bank of Evansville, Ind., and it says that its said lien arose in this way:

The bankrupt, T. J. Atkins, some time prior to the bankruptcy proceedings instituted against him, undertook to convey to his son and grand-children the said real estate hereinbefore referred to,

48 but that at the time of said conveyance the said Atkins was heavily involved and insolvent, and said conveyance was made without any consideration, and this petitioner's debt had been created prior thereto; that under the law, as made and provided in Kentucky, this petitioner filed its suit in the McCracken Circuit Court and procured an attachment to be levied upon said real estate, and thereby acquired a lien upon said property for the payment of its debt, said court having held that the conveyance by the said T. J. Atkins of said property was constructively fraudulent as to the claim and debt of said petitioner, and also that of the Old State National Bank of Evansville, Ind., as well as the debt of the

Globe Bank and Trust Company. It says that the Trustee in Bankruptcy of T. J. Atkins, bankrupt, was a party to said proceeding in the McCracken Circuit Court, having made himself such under the orders of the United States District Court for the Western District of Kentucky, and said Trustee not being satisfied with the judgment of the McCracken Circuit Court, holding that the three creditors above referred to of T. J. Atkins had, by operation of law, a superior lien upon said real estate, appealed from said judgment to the Court of Appeals of Kentucky, and that in said Court of Appeals of Kentucky the judgment of the McCracken Circuit Court determining said liens in favor of the banks above mentioned as being superior to all other claims against said property was affirmed, and the Special Master under appointment of McCracken Circuit Court who sold said property was directed to collect the proceeds of said sale and deport to this Court for distribution thereof. But holding and determining that the proceeds of the sale of said parcels of said real estate should be paid first in satisfaction of the debts and liens of the Globe Bank and Trust Company, the First National Bank of Paducah and Old State National Bank of Evansville, and that if there should be anything left of the proceeds of said sale, after the satisfaction of said claim, then the same should be paid to the grantees in the deed made by T. J. Atkins, hereinbefore referred to.

The petitioner further states that the attachment hereinbefore referred to were procured and levied upon said real estate prior to the bankruptcy proceeding against T. J. Atkins, but that by an order of the District Court of the United State for the Western District of Kentucky, which order is filed with the Referee in this proceeding, the said attached liens were preserved and are still in force for the benefit of those creditors of T. J. Atkins, bankrupt, who are, under the law, entitled to a lien upon the real estate hereinbefore referred to, being the Globe Bank and Trust Company and
49 the Old State National Bank of Evansville and First National Bank of Paducah.

Your petitioner further states that by reason of the facts hereinbefore set forth, it had a lien upon said parcels of real estate, and that its lien was enforced to the extent of sale of said real estate by order of the McCracken Circuit Court, and the same has been approved and confirmed by the Court of Appeals of Kentucky, and that said lien is superior to all other claims against the estate of the said T. J. Atkins, except the claim of the Globe Bank & Trust Company and the Old State National Bank of Evansville and First National Bank of Paducah, hereinbefore referred to, and that it is of equal dignity with their claims and liens; that no other claims except those referred to has any right to participate in the proceeds of the sale of said real estate.

Therefore your petitioner prays this Honorable Court to direct the Trustee in Bankruptcy to credit the bonds which were executed by this petitioner by the amount of its debt to the extent that it is necessary to satisfy said bonds, and that if there be a balance left of petitioner's claim, which there will be, it asks that the same be

satisfied as far as can be from the proceeds of the sale of said real estate after the payment of costs, and it asks for all proper relief.

T. L. CRICE,
Att'y for First National Bank of Paducah, Ky.

The affiant, T. A. Baker, says that he is Cashier of the First National Bank, of Paducah, Ky., and that he is authorized to make this petition and amended supplemental proof of the claim of the First National Bank against T. J. Atkins, Bankrupt in Bankruptcy; and he further says that the statements set out and contained in said petition and amended and supplemental proof of claim of the First National Bank herein are true to the best of his knowledge and belief.

T. A. BAKER.

Subscribed and sworn to before me by T. A. Baker, this the 9th day of May, 1910. My commission expires January 23, 1912.

[L. S.] DOW WILCOX,
Notary Public, McCracken Co., Ky.

The Supplemental petition of the Old State National Bank of Evansville, Indiana, is as follows:

50 In the District Court of the United States for the Western District of Kentucky.

In Bankruptcy.

In the Matter of T. J. ATKINS, Bankrupt.

Petition and Amended Supplemental Proof of Claim of the Old State National Bank of Evansville, Ind.

Comes the Old State National Bank of Evansville, Ind., and with leave of this Court files this, its petition, and hereby amends and supplements the proof of its claim against T. J. Atkins, bankrupt:

The said petitioner, Old State National Bank of Evansville, states that it obtained a judgment in the McCracken Circuit Court against T. J. Atkins in the sum of Five Thousand and Twelve Dollars, with interest thereon from the 29th day of Sept., 1908, and that no part of said debt has been paid.

The petitioner further states that on the 9th day of January, 1909, proof of this claim was filed in this proceeding, and in said proof it was stated that it had no security for the payment of said claim; but this petitioner states that since the original proof of claim was filed in this proceeding both the McCracken Circuit Court and the Court of Appeals of Kentucky have determined that petitioner has as security *upon* its claim upon certain real estate in the city of Paducah, and being the same real estate referred to in the report of the Trustee in Bankruptcy of T. J. Atkins, to-wit: Arthur Y. Martin as the property sold by him under decree of the

McCracken Circuit Court, and which report is here referred to for a more particular description of said property.

Now your petitioner further states that as security of its said claim of $5,012.00, with interest from the 29th day of Sept., 1908, it has a lien upon the property just hereinbefore referred to, which lien is of equal dignity with that of the Globe Bank and Trust Company, and also that of the First National Bank, and it says that its said lien arose in this way:

The bankrupt, T. J. Atkins, sometime prior to the bankruptcy proceeding instituted against him, undertook to convey to his son and grand-children, the said real estate hereinbefore referred to, but that at the time of said conveyance the said Atkins was heavily involved and insolvent, and said conveyance was made without any consideration, and this petitioner's debt had been created prior thereto; that under the law, as made and provided in Kentucky,
51 this petitioner filed its suit in the McCracken Circuit Court and procured an attachment to be levied upon said real estate and thereby acquired a lien upon said property for the payment of its debt,—said court having held that the conveyance by the said T. J. Atkins of said property was constructively fraudulent as to the claim and debt of said petitioner, and also that of the First National Bank of Paducah as well as the debt of the Globe Bank and Trust Company. It says that the Trustee in Bankruptcy of T. J. Atkins, bankrupt, was a party to said proceeding in the McCracken Circuit Court, having made himself such under the orders of the United States District Court for the Western District of Kentucky, and said Trustee, not being satisfied with the judgment of the McCracken Circuit Court, holding that the three creditors above referred to of T. J. Atkins had by operation of law a superior lien upon said real estate appealed from said judgment to the Court of Appeals of Kentucky, and that in said Court of Appeals of Kentucky the judgment of the McCracken Circuit Court, determining said liens in favor of the banks above mentioned as being superior to all other claims against said property, was affirmed, and the Special Master under appointment of McCracken Circuit Court who sold said property was directed to collect the proceeds of said sale and report to this Court for distribution thereof. But holding and determining that the proceeds of the sale of said parcels of said real estate should be paid first in satisfaction to the debts and liens of the Globe Bank and Trust Company, the Old State National Bank of Evansville, Ind., and The First National Bank of Paducah, and that if there should be anything left of the proceeds of said sale after the satisfaction of said claim, then the same should be paid to the grantees in the deed made by T. J. Atkins hereinbefore referred to.

The petitioner further states that the attachment — hereinbefore referred to were procured and levied upon said real estate prior to the bankruptcy proceeding against T. J. Atkins, but that by an order of the District Court of the United States for the Western District of Kentucky, which order is filed with the Referee in this proceeding, the said attachment liens were preserved and are still in

force for the benefit of those creditors of T. J. Atkins, bankrupt, who are, under the law, entitled to a lien upon the real estate hereinbefore referred to, being the Globe Bank and Trust Company and the First National Bank and this petitioner.

Your petitioner further states by reason of the facts hereinbefore set forth it had a lien upon said parcels of real estate, and that its lien was enforced to the extent of sale of said real estate
52 by order of the McCracken Circuit Court, and the same has been approved and confirmed by the Court of Appeals of Kentucky, and that said lien is superior to all other claims against the estate of the said T. J. Atkins, except the claims of the Globe Bank & Trust Company and the First National Bank of Paducah, hereinbefore referred to, and that it is of equal dignity with their claims and liens; that no other claims except those referred to has any right to participate in the proceeds of the sale of said real estate.

Therefore your petitioner prays this Honorable Court to direct the Trustee in Bankruptcy to credit the bonds which were executed by this petitioner, by the amount of its debt, to the extent that it is necessary to satisfy said bonds, and that if there be a balance left of petitioner's claim, which there will be, it asks that the same be satisfied as far as can be from the proceeds of the sale of said real estate after the payment of costs, and it asks for all proper relief.

THE OLD STATE NATIONAL BANK
OF EVANSVILLE, IND.,
By WHEELER, HUGHES & BERRY, *Att'ys.*

D. H. Hughes says that he is one of the attorneys for the Old State National Bank of Evansville, Indiana, a corporation, none of the officers of which is now in this State, and that the foregoing statements are true; that he is authorized to make this affidavit.

D. H. HUGHES.

Subscribed and sworn to before me by D. H. Hughes this May 9th, 1910.

EMMET W. BAGBY,
Referee in Bankruptcy.

The Response of A. Y. Martin, Trustee, is as follows:

In the United States District Court for the Western District of Kentucky.

In Bankruptcy.

In the Matter of T. J. Atkins, Bankrupt.

Response of Arthur Y. Martin, Trustee; Bank of Murray, Citizens Bank of Murray, and Citizens Savings Bank, to the Petition and Supplemental Petitions of the Globe Bank & Trust Company, First National Bank and the Old State Bank of Evansville, Indiana.

Comes Arthur Y. Martin, Trustee of the estate of T. J. Atkins, Bankrupt; Bank of Murray and Citizens Bank of Murray, both of

Murray, Kentucky; and Citizens Savings Bank of Paducah, Kentucky, creditors whose claims have heretofore been filed and
53 allowed aginst the estate of this bankrupt, and for response to the petitions and supplemental petitions of the Globe Bank & Trust Company and the First National Bank of Paducah, Kentucky, and the Old State Bank of Evansville, Ind., and say:

That on the 3d day of December, 1906, the bankrupt, T. J. Atkins, conveyed various parcels of real estate, description of which is hereinafter referred to, to Ed. L. Atkins, the son of the bankrupt, and to the children of the said Ed. L. Atkins. That after said conveyances your respondents, the three banks named, and various other creditors whose claims have been proved and allowed in this bankruptcy proceeding, loaned money to the bankrupt, as evidenced by their proofs of claim herein filed and allowed,—

That prior to the execution and delivery of said deed on the date above stated the petitioners herein, to-wit, Globe Bank & Trust Company and First National Bank of Paducah, Kentucky, and the Old State National Bank of Evansville, Ind., hereinafter referred to as the petitioners, loaned various sums of money to the bankrupt, as is evidenced by their proofs of claim heretofore filed and allowed herein.

That on the 25th day of August, 1908, the petitioners, Globe Bank & Trust Company, instituted a suit in the McCracken Circuit Court against T. J. Atkins and the vendees named in said deed, seeking a judgment for the amount of the debt of said bank and to set aside the deed of conveyance as fraudulent and void, and had issued an attachment which was levied upon said property.

That on the 29th day of September, 1908, the petitioner, Old State National Bank of Evansville, Ind., instituted a similar action and had an attachment similarly issued and levied from the same court, and on the 16th day of October, 1908, the First National Bank of Paducah, Kentucky, instituted a similar action and had an attachment similarly issued and levied from the same court, all against the same parties.

That thereafter, and within less than four months from the institution of any of said actions last above mentioned, a petition in bankruptcy was filed in the United States District Court for the Western District of Kentucky, upon which T. J. Atkins in due course on the 28th day of December, 1908, was duly adjudicated a bankrupt.

That thereafter the three actions of the petitioners for the recovery of said property were consolidated in the McCracken Circuit
54 Court, together with actions instituted by your respondents likewise pending in said court, but upon which no attachments had been issued, and, by orders of this court, the Trustee in Bankruptcy herein instituted an action asserting his right as Trustee in Bankruptcy to recover all of said property, and his action was consolidated with the other actions above mentioned.

That thereafter said consolidated actions were heard by the McCracken Circuit Court and a judgment therein rendered, a certified copy of which is filed with the report and petition of the

Trustee, which is referred to and made a part hereof as if fully set forth herein.

That in said judgment it was decreed that the conveyance of the real estate was fraudulent and void under the Kentucky law as to the debts of the petitioners which were created prior to the execution and delivery of the deed, and said property was ordered sold and the proceeds paid over to the Trustee in Bankruptcy for distribution as directed by this Court.

That owing to ambiguity and uncertainty contained in the direction of the judgment as to the disposition of the proceeds whether to be paid in accordance with the orders of this court or the McCracken Circuit Court the Trustee herein appealed to the Court of Appeals of Kentucky and the Court of Appeals affirmed the judgment of the McCracken Circuit Court and directed, unequivocally, that the proceeds arising from the sale of said property should be paid over to the Trustee herein, to be distributed by him as directed by this court.

II. Your petitioners say that the indebtedness proved and allowed against the estate of T. J. Atkins aggregates over $60,000.00, and that unless the fund coming into the hands of the Trustee from the sale of said property is distributable among all of the creditors of said estate, without preference or priority in favor of the petitioners herein, that the other creditors whose debts aggregate over $40,000.00 will receive substantially nothing on their proved and allowed claims.

Your respondents now say that under the Bankruptcy Act it is provided in Section 87*f*:

"That all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same,

And shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the
55 right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

That by reason of the law as above stated the attempt by the petitioners to obtain priority by attachment proceedings in the actions above referred to was thwarted and they received no benefit or advantage by reason thereof.

That under Section 70*a* and *e* of the Bankruptcy Act it is further provided:

"70*a*. The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification

Shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt to all—

(4). Property transferred by him in fraud of his creditors.
(5). Property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him.

70*e*. The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication."

That by reason of the provisions of the Bankrupt Act above quoted, the right of action for the recovery of property fraudulently conveyed passed to and became vested in the Trustee for the benefit of all the creditors of the estate.

That the jurisdiction of the McCracken Circuit Court was invoked and could only be invoked for the purpose of the availment of the Kentucky laws providing for the recovery of property conveyed in fraud of creditors, but that the McCracken Circuit Court had only the right to determine whether or not the property was recoverable by the Trustee or by any creditors, and that such recovery under the bankruptcy law, where the right existed in any creditor or the Trustee inured to the Trustee for the benefit of the whole estate represented by him.

56 That the McCracken Circuit Court was powerless to adjudge a trust in said property in favor of the petitioners herein which would be effectual against the right of the Trustee provided in the bankruptcy act to take over and assert said cause of action and distribute the proceeds arising therefrom for the benefit of the bankrupt estate.

That the distribution of the funds arising from the sale of said property is solely and exclusively determined by the bankruptcy act, to be applied by this court.

Your respondents, therefore, deny that the petitioners, Globe Bank & Trust Company, First National Bank, Old State National Bank of Evansville, Ind., are entitled to any preference or priority in the fund arising from the sale of said property by reason of any order or judgment of the McCracken Circuit Court or the Court of Appeals of Kentucky, or any order of this court heretofore made, but say that all of said funds should be ratably and equitably distributed by this Court among all creditors of this estate whose claims have been proved and allowed, without priority, preference or advantage, and they pray for an order directing the Trustee to make such a distribution.

ARTHUR Y. MARTIN,
Trustee of T. J. Atkins, Bankrupt;
BANK OF MURRAY,
CITIZENS BANK OF MURRAY,
CITIZENS SAVINGS BANK,
By J. D. MOCQUOT AND
BRADSHAW & BRADSHAW,
Att'ys.

The order directing Trustee to pay to the antecedant creditors entire fund in his hands, pro rata, dated May 23rd, 1910, is as follows:

In the District Court of the United States for the Western District of Kentucky.

In Bankruptcy.

In the Matter of THOMAS J. ATKINS, Bankrupt.

At a court of bankruptcy held by the undersigned Referee on the 21st day of May, 1910, pursuant to agreement had between counsel for the parties hereinafter named, there were present the Trustee, A. Y. Martin, and his counsel, W. F. Bradshaw, Jr. D. G. Park, attorney for the Globe Bank & Trust Co., D. H. Hughes, attorney for the Old State National Bank, of Evansville, Ind., and T. L. Crice, attorney for the First National Bank of Paducah, Ky., when the following proceedings were had:

57 This cause coming on to be heard by the Referee upon the question presented to him as to which of the creditors hereinafter referred to are entitled to participate in the distribution of the fund in the hands of the Trustee of the bankrupt's estate, A. Y. Martin, and the Court being sufficiently advised upon the proof of claims, pleadings, exhibits and reports on file in the controversy among the creditors whose debts were created prior to the execution of the deed by the bankrupt, T. J. Atkins, to Ed. L. Atkins and others, to-wit: The Globe Bank & Trust Company, the Old State National Bank of Evansville, Ind., and the First National Bank of Paducah, Ky., against A. Y. Martin, Trustee in Bankruptcy, and the creditors of the bankrupt whose debts were created subsequent to the execution of the deed of said bankrupt, T. J. Atkins, to Ed. L. Atkins and others, as to what creditors or class of creditors are entitled to share or participate in the distribution of the proceeds realized from the sale of the real estate sold under the judgment of the McCracken Circuit Court in the consolidated actions under title and style of the Globe Bank & Trust Company against T. J. Atkins and others, and the Court being sufficiently advised, it is adjudged that the creditors of the bankrupt whose debts were created prior to the execution of the deed by the bankrupt, T. J. Atkins, to Ed. L. Atkins and others, and which have been proved and allowed herein, are the only class of creditors entitled to share or participate in the distribution of the funds realized from the sale of the real estate sold under the judgment of the McCracken Circuit Court in said consolidated actions of the Globe Bank & Trust Co. against T. J. Atkins and others; and,

It is further adjudged by the Court that the Globe Bank and Trust Company, the Old State National Bank of Evansville, Ind., and the First National Bank of Paducah, Ky., are the only creditors of the bankrupt whose debts were created prior to the execution and delivery of said deed by T. J. Atkins to Ed. L. Atkins and others.

The Court further finds and adjudges that there was realized from

the sale of said real estate, under the judgment of the McCracken Circuit Court in said consolidated actions aforesaid the sum of $16,146.58; that such funds are insufficient to pay the debts of the Globe Bank & Trust Company, the Old State National Bank of Evansville, Ind., and the First National Bank of Paducah, Ky., created prior to the execution of said deed by said bankrupt, T. J. Atkins, to Ed. L. Atkins and others and such antecedent creditors as aforesaid are entitled to said entire fund in the payment
58 of their antecedent debts pro rata, subject to the costs and taxes herein allowed against such fund; and the Trustee in Bankruptcy, A. Y. Martin, is hereby ordered and directed to pay the entire amount aforesaid to the Globe Bank & Trust Company, the Old State National Bank of Evansville, Ind., and the First National Bank of Paducah, Ky., pro rata upon their respective antecedent debts as follows:

To the Globe Bank & Trust Company on its debt of $9,837.00, the sum of $6,661.36.

To the Old State National Bank of Evansville, Ind., on its debt of $5,493.15, the sum of $3,719.75.

To the First National Bank of Paducah, Ky., on its debt of $6,558.00, the sum of $4,440.88.

EMMET W. BAGBY,
Referee in Bankruptcy.

And on July 16th, 1910, the following proceedings were had:

United States District Court, Western District of Kentucky.

In the Matter of THOMAS J. ATKINS, Bankrupt.

Order on Petition for a Review.

This day came Arthur Y. Martin, Trustee, in person and others in the same interest, by J. D. Mocquot, their counsel; and came also the Globe Bank and Trust Company, the First National Bank of Paducah, Ky., and the Old State National Bank of Evansville, Ind., by D. G. Park, T. L. Crice and Wheeler & Hughes, their respective counsel, and the questions arising upon the petition filed herein on June 2, 1910, by Arthur Y. Martin, Trustee of said bankrupt, for a review by the Court of the order referred to in said petition, and which order was made by the Referee on May 21, 1910, were argued by counsel, and the Court being sufficiently advised, is of opinion,

First, that the voluntary conveyance made by the said bankrupt to Ed. L. Atkins on December 4, 1906, though void as to the then existing creditors of the bankrupt, was not so as to creditors whose debts were created thereafter;

Second, that the lis pendens liens and the attachments in the suits in the State Court were, under the order of this court, entered herein on February 18, 1909, preserved for the benefit of the estate;

Third, that the subsequent creditors having no interest in the

land embraced in said conveyance under the law of Ken-
59 tucky, or under the general principles of equity applicable to voluntary conveyances not actually fraudulent, there was nothing in the lis pendens, or in the attachments, nor otherwise, that created for such subsequent creditors any interest in the proceeds of the land; and,

Fourth, that the construction of the Kentucky Statutes by the Court of Appeals in the cases referred to is binding upon this Court, even if it did not (as it does) agree with that decision.

The Court not being able to see that the subsequent creditors have any interest in the fund arising from the sale of the land, but believing, as it does, that said fund belongs and should go as the Referee directed, upon consideration of the premises it is ordered, adjudged and decreed by the Court that the petition for a review should be, and it is, dismissed, and that the order of the Referee, referred to therein, should be, and it is, approved and affirmed.

And on December 3rd, 1910, the following proceedings were had:

In the Matter of THOMAS J. ATKINS, Bankrupt.

This day came Arthur Y. Martin, Trustee of the bankrupt herein, by W. F. Bradshaw, Jr., its attorney, and filed his petition for an appeal and assignment of errors herein. It is ordered that said appeal be allowed to the United States Circuit Court of Appeals for the Sixth Circuit, from the judgment entered herein July 16th, 1910, upon said trustee executing bond in the sum of One Hundred and Fifty Dollars, with good surety to be approved by this Court.

The Petition for appeal and assignment of errors above referred to is as follows:

The District Court of the United States for the Western District of Kentucky.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Plaintiff,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KY.; FIRST NATIONAL Bank of Paducah, Ky., and the Old State National Bank of Evansville, Ind., Defendants.

60 *(Petition for Appeal.)*

The above named plaintiff, Arthur Y. Martin, trustee in bankruptcy of Thomas Jeremiah Atkins, bankrupt, conceiving himself aggrieved by the decree made and entered on the 16th day of July, 1910, on the hearing of the petition of Arthur Y. Martin, trustee, as aforesaid for a review of an order of the referee made in a controversy arising out of a bankruptcy proceeding to-wit: the bankruptcy proceedings in the matter of said Thomas Jeremiah Atkins,

bankrupt, between the plaintiff trustee and the defendants, Globe Bank & Trust Company of Paducah, Ky., First National Bank of Paducah, Ky., and the Old State National Bank of Evansville, Ind., does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Sixth Circuit for the reason specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record proceedings and papers upon which said order was made duly authenticated may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

This November 28th, 1910.

BRADSHAW & BRADSHAW,
J. D. MOCQUOT,
Solicitors for Appellant.

The Assignment of errors above referred to is as follows:

The District Court of the United States for the Western District of Kentucky.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Plaintiff,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KY.; FIRST NATIONAL Bank of Paducah, Ky., and the Old State National Bank of Evansville, Ind., Defendants.

(*Assignment of Error- on Appeal.*)

And now on the 28th day of November, 1910, comes Arthur Y. Martin, trustee in bankruptcy of Thomas Jeremiah Atkins, appellant herein by Bradshaw & Bradshaw and J. D. Mocquot his solicitors and says that the judgment and decree in said case rendered by the United States District Court for the Western District of Kentucky on July 16th, 1910, is erroneous and against the just rights of the said trustee for the following reasons:

61 First. Because the evidence shows that the property in controversy was property conveyed by the bankrupt in fraud of his creditors within the meaning of section 70*a* 4 of the Bankruptcy Act of 1893.

Second. Because such fraudulent conveyance gave rise to a cause of action which certain creditors could have asserted and maintained for the recovery of such property and that under section *e* of the bankruptcy act such cause of action vested in the trustee of the bankrupt and he alone had the right to maintain such action and recover such property for the benefit of the bankrupt estate and the creditors thereof.

Third. Because the attachments levied upon the property in controversy at the instance of the defendant creditors within four months prior to the institution of the bankruptcy proceedings against the bankrupt, were dissolved and annulled by the bankruptcy and

the priority and advantage by reason of such attachments were lost to the defendants.

Fourth. Because at the instance of the defendant, Globe Bank & Trust Company, the district court of the United States for the Western District of Kentucky, entered an order on the 18th day of February, 1909, preserving the attachment lien arising by reason of the attachments of the defendant levied upon said property for the benefit of the bankrupt estate and in said order further authorized the trustee to institute an action for the recovery of said property for the benefit of the bankrupt estate.

Fifth. Because the district court held that creditors whose debts were created subsequent to the fraudulent conveyance of the property in controversy by the bankrupt had no interest in the proceeds arising from the recovery thereof.

Sixth. Because the state court of Kentucky in which the action had been instituted by the trustee for the recovery of the property in controversy adjudged said conveyance to have been fraudulent and rendered a judgment adjudging that the proceeds arising from the sale of said property should be paid over to the trustee in bankruptcy as a part of the bankrupt estate to be held by him subject — and to be "administered as a part of the bankrupt estate in the bankruptcy court." That the district court in directing a disposition of such fund in bankruptcy disregarded the Bankrupt Act, but held that he was bound in this matter by the construction of the Kentucky
62 Statutes by the Court of Appeals of Kentucky in said case. That in fact no statutes of Kentucky was involved in determining the disposition or distribution of such recovery, but the Court of Appeals of Kentucky directed the fund in controversy to be paid into the bankruptcy court for distribution under the Bankruptcy Act.

Seventh. Because even if the state court of Kentucky in the actions to set aside said conveyance as fraudulent had undertaken to direct the distribution of the fund realized from the sale of the property in controversy such judgment or decree of the state court would have been a nullity and not binding upon the court of bankruptcy, which alone had the power to distribute the fund recovered as a part of the estate in bankruptcy.

Eighth. Because under the evidence and the law the claim of the trustee to have all of the proceeds arising from the sale of the property recovered distributed among the general creditors of the bankrupt estate should have been allowed.

Wherefore the appellant trustee prays that said judgment and decree be reversed, and that the said court may be directed to enter a decree and judgment directing the referee to order a distribution of said fund ratably among all of the creditors of the bankrupt estate and for all other proper and equitable relief.

BRADSHAW & BRADSHAW,
J. D. MOCQUOT,
Solicitors for Appellant.

And on the 10th day of January, A. D. 1911, the following proceedings were had:

In the Matter of THOMAS J. ATKINS, Bankrupt.

This day came Arthur Y. Martin, Trustee in bankruptcy of Thomas J. Atkins, bankrupt, and tendered his Appeal Bond herein in the penalty of One Hundred and Fifty ($150.00) Dollars, with L. M. Reike as Surety, conditioned according to law, which bond is now examined and approved by the court and filed.

63 The Appeal Bond above referred to is as follows:

District Court of the United States, Western District of Kentucky.

In Bankruptcy.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KY.; FIRST NATIONAL Bank of Paducah, Ky., and Old State National Bank of Evansville, Ind.

Know all men by these presents, that we, Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, are held and firmly bound unto Globe Bank & Trust Company, of Paducah, Ky., First National Bank of Paducah, Ky., and Old State National Bank of Evansville, Ind., in the sum of One Hundred and fifty dollars, to be paid to the said Globe Bank & Trust Company, First National Bank and Old State National Bank, executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 9th day of December, A. D. 1910.

Whereas, The above named Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, hath prosecuted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit to reverse the decree rendered in the above entitled suit by the District Court of the United States for the Western District of Kentucky, at Louisville.

Now, therefore, the condition of this obligation is such that if the above named Arthur Y. Martin, Trustee, shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ARTHUR Y. MARTIN, *Trustee.* [L. S.]
L. M. RIEKE. [L. S.]

Filed January 10th, 1911.

A. G. RONALD, *Clerk.*

Examined and approved January 10th, 1911.

WALTER EVANS, *Judge.*

64 STATE OF KENTUCKY,
County of McCracken,
City of Paducah, ss:

L. M. Reike, the surety in the foregoing bond, being duly sworn, deposes and says that he is a resident of Paducah, McCracken County, Kentucky, and an owner and holder within said County and State, in said district, and is worth in property at its actual value more than $3,000.00 over all debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale of execution.

L. M. RIEKE.

Subscribed and sworn to before me by L. M. Rieke, this the 9th day of January, 1911.

MRS. LENA HATCH,
Examiner, McCracken Co., Ky.

The District Court of the United States for the Western District of Kentucky.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Appellant,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KY.; FIRST NATIONAL Bank of Paducah, Ky., and the Old State National Bank of Evansville, Indiana, Appellees.

(*Præcipe for Transcript on Appeal.*)

To A. G. Ronald, Clerk:

Please make transcript of the following papers in the above entitled matter:

1st. Certificate of Referee on review and Petition of A. Y. Martin, Trustee, &c., for a review.

2d. Report and Petition of A. Y. Martin, Trustee, with Exhibits A, B, C, D and E, thereto attached, filed before the Referee May 5, 1910.

3d. Proof of claim of Globe Bank & Trust Co., Paducah, Ky., filed before the Referee Jan. —, '09.

4th. Proof of claim of Old State Bank, Evansville, Ind., filed before the Referee —, '09.

5th. Proof of claim of the First National Bank, Paducah, Ky., filed before the Referee Jan. 9, 1909.

6th. Petition of Globe Bank & Trust Company, filed in the District Court Jan. 9, 1909.
7th. Opinion filed February 18th, 1909.
8th. Order of the District Court of Feb. 18, 1909.
9th. Order of the Referee authorizing Trustee to institute action filed April 8, 1909.
65–66 10th. Supplemental Petition of the Globe Bank & Trust Co., filed May 7, 1910.
11th. Supplemental Petition of the First National Bank, filed May 9, 1910.
12th. Supplemental Petition of Old State National Bank, filed May 9, 1910.
13th. Response of A. Y. Martin, Trustee, filed May 12, 1910.
14th. Order of the Referee filed May 23, 1910.
15th. Order of the District Court, filed July 16, 1910.
File the transcript with the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

A. Y. MARTIN,
Trustee in Bankruptcy.

Dec. 17, 1910.

WESTERN DISTRICT OF KENTUCKY, *ss:*

I, A. G. Ronald, Clerk of the District Court of the United States for the Western District of Kentucky, do hereby certify that the foregoing 88 pages contain a true and correct transcript of the record and proceedings had in the case of Thomas Jeremiah Atkins, bankrupt, in bankruptcy, No. 1339, as per the præcipe of counsel copied herein and made a part hereof as the same appears from the files and records in my said office.

Witness my hand and seal of said Court this 21st day of February, 1911.

[SEAL.]

A. G. RONALD, *Clerk,*
By HENRY F. CASSIN, *D. C.*

67 *Supplemental Record.*

United States Circuit Court of Appeals for the Sixth Circuit.

Case No. 2091.

In the Matter of the Petition of ARTHUR Y. MARTIN, Trustee of Thomas Jeremiah Atkins, Bankrupt, to Review or Reverse an Order of the District Court of the United States for the Western District of Kentucky in the Case of Thomas Jeremiah Atkins, Bankrupt.

United States Circuit Court of Appeals for the Sixth Circuit.

Case No. 2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KY., and OLD STATE National Bank of Evansville, Ind., and First National Bank of Paducah, Ky., Appellees.

Appealed from the District Court of the United States *from* the Western District of Kentucky.

Stipulation.

It is hereby agreed and stipulated in the above styled cases on Petition for Review and on appeal that "The Petition of the Globe Bank & Trust Company filed on the 20th day of January, 1909, in the United States District Court, Western District of Kentucky in the matter of J. T. Atkins, Bankrupt" as recited in the order in Printed Record herein on Page 40 of such record and the written notices therein filed on the same date, a certified copy of which is hereto attached as a part of this agreement; also "the reply of the Globe Bank & Trust Company to the response of Arthur Y. Martin, Trustee, and others filed before the referee May 13th, 1910, and the Reply of the First National Bank and Old State National Bank" to such response, filed May 16th, 1910, as recited and referred to in Certificate of Referee on Page 4 of such Printed Record, certified copies of both of which are hereto attached as a part of this agreement, shall be filed and made a part of the record in this court in both cases, on the Petition for Review and on Appeal, and shall be printed in due form and added to the Printed Record of this
68 Court as a part of it for consideration by this court on the trial; and it is further agreed that all briefs filed by counsel in either case shall be considered by the court as briefs filed in both cases on the trial.

In witness whereof we have hereunto signed our names.

GLOBE BANK AND TRUST COMPANY,
By D. G. PARK, *Attorney.*
OLD STATE NATIONAL BANK OF EVANSVILLE, IND.,
By WHEELER & HUGHES, *Att'ys.*
FIRST NATIONAL BANK OF PADUCAH, KY.,
By T. L. CRICE, *Its Att'y.*
A. Y. MARTIN, *Trustee,*
By J. D. MOCQUOT, *Att'y.*
BANK OF MURRAY,
By J. D. MOCQUOT, *Att'y.*
CITIZENS BANK OF MURRAY,
By J. D. MOCQUOT, *Att'y.*
CITIZENS SAVINGS BANK,
By J. D. MOCQUOT, *Att'y.*

In the District Court of the United States for the Western District of Kentucky.

MARY LEE OWEN and Others, Petitioning Creditors,
vs.
T. J. ATKINS, Bankrupt.

Notice.

The petitioning creditors, Mary Lee Owen, American German National Bank and Mechanics & Farmers Savings Bank, and their attorneys, Bradshaw & Bradshaw, will take notice that on Wednesday, the 20th day of January, 1909, at 10 o'clock A. M., in the United States or Federal Court room in the City of Louisville, Kentucky, in the involuntary bankruptcy proceedings against T. J. Atkins, bankrupt, on the petition of Mary Lee Owen, the Mechanics & Farmers Savings Bank and the American German National Bank of Paducah, Kentucky, as petitioners therein, we will file the petition of the Globe Bank & Trust Company in the Clerk's office of such court and move the Court before Hon. Walter Evans, Judge thereof, for an order and judgment directing that all liens and equities and rights acquired in any manner by the Globe Bank & Trust Company in the action in equity pending in the McCracken Circuit Court in which the Globe Bank & Trust Company is plaintiff and T. J. Atkins and others are defendants, filed August 25th, 1908, attaching certain property therein described and seeking to set aside the fraudulent conveyance therein alleged as having been made on December 3rd, 1908, by T. J. Atkins to Ed. L. Atkins and others, and to subject same to its debts therein alleged as the property
69 of T. J. Atkins shall be reserved and protected in full force and effect pending the bankruptcy proceedings herein against T. J. Atkins until final adjudication in such bankruptcy proceed-

ings, and for permission for the Globe Bank & Trust Company to prosecute such action to final judgment in the McCracken Circuit Court in McCracken County, Kentucky, where the same is now pending, and for directions to Arthur Y. Martin, Trustee in Bankruptcy, to permit the use of his name as co-plaintiff therein with the Globe Bank & Trust Company for such prosecution of the action, or for permission to make such trustee a party defendant in such action, with permission for the plaintiff, Globe Bank & Trust Company, to so prosecute to final judgment; but all without prejudice to the rights of the estate of T. J. Atkins, bankrupt, or any other creditors of such estate, reserving the rights of all parties or creditors until final adjudication and distribution of the assets of the estate of T. J. Atkins, bankrupt, in the proceedings in bankruptcy aforesaid. All of which you will please take notice.

GLOBE BANK & TRUST COMPANY.
By D. G. PARK, *Attorney.*

Endorsed on back of above page as follows:
"Executed in full by delivering a true copy of the within Notice to W. F. Bradshaw, Jr., of the firm of Bradshaw & Bradshaw, Attorneys for the parties therein named, so executed in McCracken County, Kentucky, this January 19th, 1909.

JNO. W. OGILVIE, *S. M. C.*,
By GUS. ROGERS, *D. S.*"

In the District Court of the United States for the Western District of Kentucky.

In Bankruptcy.

In the Matter of T. J. ATKINS, Bankrupt.

The City National Bank of Paducah and its attorneys, Wheeler, Hughes & Berry; the old State National Bank and its attorneys, Wheeler, Hughes & Berry; the First National Bank and its attorney, J. D. Mocquot; the Citizens' Savings Bank and its attorney, J. D. Mocquot; Citizens' Bank of Murray and its attorney, J. D. Mocquot, and Arthur Y. Martin, Trustee in Bankruptcy for T. J. Atkins, bankrupt, will all take notice that on Wednesday, the 20th day of January, 1909, at 10 o'clock A. M., in the United States or Federal Court room in the city of Louisville, Kentucky, in the involuntary bankruptcy proceedings against T. J. Atkins, bankrupt, on the petition of Mary Lee Owen, the Mechanics & Farmers Savings Bank and the American German National Bank of Paducah, Ken-
70 tucky, as petitioners therein, we will file the petition of the Globe Bank & Trust Company in the Clerk's office of such court and move the Court before Hon. Walter Evans, Judge thereof, for an order and judgment directing that all liens and equities and rights acquired in any manner by the Globe Bank & Trust Company in the action in equity pending in the McCracken Circuit Court in which the Globe Bank & Trust Company is plaintiff and T. J. Atkins

and others are defendants, filed August 25th, 1908, attaching certain property therein described and seeking to set aside the fraudulent conveyance therein alleged as having been made on December 3rd, 1908, by T. J. Atkins to Ed. L. Atkins and others, and to subject same to its debts therein alleged as the property of T. J. Atkins shall be reserved and protected in full force and effect pending the bankruptcy proceedings herein against T. J. Atkins until final adjudication in such bankruptcy proceedings, and for permission for the Globe Bank & Trust Company to prosecute such action to final judgment in the McCracken Circuit Court in McCracken County, Kentucky, where the same is now pending, and for directions to Arthur Y. Martin, Trustee in Bankruptcy, to permit the use of his name as co-plaintiff therein with the Globe Bank & Trust Company for such prosecution of the action, or for permission to make such trustee a party defendant in such action with permission for the plaintiff, Globe Bank & Trust Company, to so prosecute to final judgment; but all without prejudice to the rights of the estate of T. J. Atkins, bankrupt, or any other creditor of such estate, reserving the rights of all parties or creditors until final adjudication and distribution of the assets of the estate of T. J. Atkins, bankrupt in the proceedings in bankruptcy aforesaid. All of which you will please take notice.

GLOBE BANK & TRUST CO.,
By D. G. PARK, *Att'y.*

Endorsed on the back as follows:

"Rec'd this notice and 3 copies at Paducah, Ky., Jan. 19, 1909, at 8.30 A. M. and Executed in full by delivering a true copy of the within notice to J. D. Mocquot, Attorney for the parties herein named, and also a true copy to Arthur Y. Martin, Trustee in Bankruptcy for T. J. Atkins, bankrupt, and also a true copy to D. H. Hughes, of the firm of Wheeler, Hughes & Berry, Attorneys for the party herein named. All of which was so executed in the City of Paducah, McCracken Co., Ky.

Given under my hand this Jan. 19, 1909.

G. W. LONG,
U. S. Marshal,
By ELWOOD NEEL, *D. M.*"

71 In the District Court of the United States for the Western District of Kentucky.

In Bankruptcy.

In the Matter of T. J. ATKINS, Bankrupt.

Petition for the Protection of Liens and Equities in the State Court in an Action Pending in the McCracken Circuit Court in McCracken County, Kentucky.

The petitioner, Globe Bank & Trust Company, comes and says it is a banking corporation duly incorporated and organized under the

laws of the State of Kentucky, with power to sue and be sued, make contracts and do a general banking business, including the transactions hereinafter alleged in its corporate name, which is the Globe Bank & Trust Company, and it was such corporation at the time of the transactions so alleged. It now says it is the same person who, under such corporate name, has also filed its claim in due form before the Referee, duly proven as required by the National Bankruptcy laws of the United States, and which claim is now on file before such Referee.

Petitioner now says on the 25th day of August, 1908, it instituted an action in equity in McCracken Circuit Court in McCracken County, Kentucky, against T. J. Atkins, Ed. L. Atkins and others, in which it seeks to recover personal judgment against T. J. Atkins, the same as the bankrupt herein, for $10,250.00 upon certain notes therein alleged executed by him and others to, and discounted by, this petitioner at its bank in the City of Paducah, Kentucky, and in such action it sued out an attachment against the property of T. J. Atkins and caused same to be duly levied upon the property in real estate situated in the city of Paducah, Kentucky, and McCracken County, which is hereinafter described.

It further says that it also described specifically such property in its petition, and sought in such action to set aside a certain fraudulent conveyance executed by T. J. Atkins to Ed. L. Atkins and others on the 3rd day of December, 1906, and subject the property therein conveyed to the payment of its debts which had been created prior to the execution of such deed, and process was duly served on all of the defendants therein, on T. J. Atkins by personal service on summons and on the other defendants by warning order duly made in such action. It also caused to be filed due notice of its action with a specific description of the property therein attached and the property described in its petition in the Clerk's office of the McCracken County Court and there duly recorded as required by the statute laws of the State of Kentucky. And it further says by the statute laws of the State of Kentucky such an action may

72 be prosecuted to set aside a fraudulent conveyance before its debt is reduced to judgment and without a judgment or a return of no property found upon an execution, and by virtue of such proceedings a trust resulted in its favor in all of such property for the payment of its debts alleged, and due notice was created against all persons whatsoever of such proceedings; that answer and subsequent pleadings were therein filed and issues joined, and such action was so pending at the time of the petition of involuntary bankruptcy herein filed against T. J. Atkins. A copy of such proceedings in the McCracken Circuit Court in McCracken County, Kentucky, is hereby filed as a part hereof marked "A," and asked to be read as a part of this petition. Petitioner says that such conveyance was fraudulently executed, and without any valuable consideration whatever on the 3rd day of December, 1906, more than four months before the proceedings in bankruptcy were instituted, and that such deed of conveyance was by deed of gift and without any valuable consideration whatever, and by such deed T. J. Atkins,

the bankrupt, conveyed to Ed. L. Atkins and others the following described real estate in McCracken County, Kentucky, upon which its attachment was duly levied and the same described in its petition aforesaid, and in which the trust resulted in its favor as hereinbefore alleged, and all of which real estate is particularly described as follows, namely:

"Part of lot No. 123 in Block 18, Lower Addition to the City of Paducah, beginning in the center of said block and running 173 feet, 3 inches to Walnut street (now 6th St.); thence down Walnut street (now 6th St.) N. fifty-seven feet; thence at right angles towards Chestnut (now 5th St.) 173 feet, 3 inches; thence at right angles towards Monroe Street fifty-seven feet and nine inches (57 ft. 9 in.) to the beginning, being a part of the same property conveyed to said Miranda A. Lee by D. A. Givens. See Deed Book "R," page 600.

Together with all the buildings and improvements thereto belonging, or in any wise appertaining, being the same described in a deed from M. A. and A. G. Lee to T. J. Atkins, dated first day of June, 1881, and recorded in the County Clerk's office of McCracken County, Kentucky, in Deed Book No. 27, page 523. Also all of the certain real estate lying in the City of Paducah, County of McCracken, and State of Kentucky, described as follows, to-wit:

One third of one fourth of block eighteen, and one fourth of block or lot No. 123, beginning at the center of block num-
73 ber eighteen, and running one hundred and seventy-three feet and three inches to Sixth street (formerly known as Walnut street) in Paducah, Kentucky, and fronting fifty-seven feet and nine inches on Sixth street; and one-half of two-thirds of one-fourth of lot Number one hundred and twenty-three; all in Addition "D," Lower Town of Paducah, Kentucky, beginning fifty-seven feet and nine inches from the corner of Madison and Sixth street on Sixth street; thence towards the Ohio River parallel with Madison Street one hundred and seventy-three feet and three inches; thence at right angles in a southeast direction fifty-seven feet and nine inches; thence at right angles one hundred and seventy-three feet and three inches to Sixth street; thence with Sixth street fifty-seven feet and nine inches from the corner of Madison and Sixth street on — -chased by D. A. Givens at Sheriff's sale by deed of J. C. Calhoun, Sheriff, dated December 18, 1887.

It being the same tract of land described in a deed from Miranda A. Lee to T. J. Atkins, dated the 2nd day of December, 1899, recorded in Deed Book No. 59, page 160.

Also all that certain lot of ground situated in the City of Paducah, McCracken County, Kentucky, and lying on the East side of Fourth street being between Broadway and Jefferson Streets, and being the South half of lot number 148, Block 13, Town "A," and more particularly described as follows:

Beginning in the East line of Fourth Street at the center of the West line of said lot No. 148; thence with said East line of Fourth street towards Broadway street 28 feet, 10½ inches to a stake; thence at right angles towards Third street 144 5/12 feet

to a stake; thence at right angles towards Jefferson street 28 feet 10½ inches; thence at right angles and through the center of lot No. 148, 144 5/12 feet to the beginning; said lot being the same in all respects conveyed by Lucy V. Overby and H. C. Overby to John G. Rinkliff, Trustee of Mangum Lodge No. 21, Independent Order of Odd Fellows, and T. J. Atkins, Trustee of Ingleside Lodge No. 195, Independent Order of Odd Fellows, and being the same lot in all respects conveyed by John G. Rinkliff, Trustee of Mangum Lodge No. 21, Independent Order of Odd Fellows to T. J. Atkins, Trustee of Ingleside Lodge No. 195, Independent Order of Odd Fellows, etc., to Ed. L. Atkins, named in said deed on the 9th day of March, 1901; also a passage way from the lot hereby conveyed over and across the rear end of the North half of lot No. 148; said passageway being 12 feet wide and extending from the lot conveyed to Anna L. Param so as to connect with the 20 foot alley
74 situated between the North end of George Rock's lot and South side of said Leech property, said last named alley instead of being a public alley.

The parties to the deed are to have use and enjoyment of said passageway for ingress and egress to and from said public alley, and in accordance with the terms and the previous deeds made in reference hereto.

It being the same real estate conveyed by Ed. L. Atkins to T. J. Atkins by deed dated 11th day of March, 1901, and recorded in Deed Book No. 63, page 218, and subject to all the conditions and agreement therein expressed.

Also the following described property situated on Eighth St. between Monroe and Madison and on the West side of Eighth St. which was conveyed heretofore by Ed. H. Puryear, Commissioner, to T. J. Atkins by deed recorded in Commissioner's deed book No. 4, page 86, and which is dated 15th day of April, 1897, and which lot or parcel of ground is described as follows:

Beginning at a point on the South side of Eighth street, (formerly Hickory), fifty-seven feet and nine inches below the corner of Monroe and Eighth streets; thence down Eighth street towards Madison street 57 feet and nine inches; thence at right angles towards Ninth street one hundred and seventy-three feet and ½ feet; thence at right angles towards Jefferson street fifty-seven and three-fourth feet to Hopkins line; thence down said line one hundred and seventy-three and one-fourth feet, *said line one hundred and seventy-three and one-fourth feet* to the beginning; same being part of lot number 132, block 27 of the City of Paducah, Kentucky.

Petitioner further says that the petitioning creditors herein are persons holding debts which were created subsequent to the execution of such deed, and subsequent to its record in the McCracken County Court Clerk's office where it had been recorded on April 20th, 1907, where such deed is now of record. Petitioner further says that on the 29th day of September, 1908, the City National Bank of Paducah, Kentucky, which is a banking corporation duly incorporated and organized under the National Banking laws of the United States also instituted an action in equity in McCracken

Circuit Court in which it sought to recover personal judgment against T. J. Atkins for $501.66 on a debt created after such deed had been executed and recorded and on a note bearing date June 9th, 1908, and in such action it specifically described the same property aforesaid and therein sought to set aside the same deed as fraudulent and without consideration; and on the same date the Old State National Bank, which is also a banking cor-
75 poration duly incorporated and organized under the National Banking Laws of the United States, but whose place of business is in the State of Indiana, also instituted an action in McCracken Circuit Court against T. J. Atkins and others, in which it specifically described in its petition the same property alleged and therein sought to set aside the same deed as fraudulent, and also sought to recover a personal judgment against T. J. Atkins for the sum of $5,012.00, and in which it alleged that such debts were created prior to December 3rd, 1906, and that the notes sued on were executed as renewals of the original debt and both of which actions were so instituted through attorneys, Wheeler, Hughes & Berry for the plaintiffs therein.

Petitioner further says that on the 16th day of October, 1908, the First National Bank of Paducah, Kentucky, which is a banking corporation duly incorporated and organized under the National Banking Laws of the United States, with their place of business located at Paducah, Kentucky, also instituted an action in equity in the McCracken Circuit Court in McCracken County, Kentucky, through its attorney, J. D. Mocquot, against the same parties, T. J. Atkins and others, in which it sought to recover a personal judgment against T. J. Atkins for the sum of $6,000.00 on a debt created prior to December 3, 1906, and also specifically described in its petition the property aforesaid and sought therein to set aside the same deed alleged; and prior thereto on June 9th, 1908, the Bank of Murray, through its attorney, J. D. Mocquot, instituted an action at law in the McCracken Circuit Court against George C. Thompson, Ed. L. Atkins and T. J. Atkins in which it sought to recover a personal judgment against T. J. Atkins for debt on note bearing date January 14, 1908, for $5,000.00; and also sued out a general attachment against the property of the defendants, George C. Thompson and Ed. L. Atkins therein and caused such atttachment to be levied on certain real estate in McCracken County, Kentucky, including the life estate of Ed. L. Atkins in the property hereinbefore alleged conveyed to him by deed of gift by deed of date December 3rd, 1906, from T. J. Atkins to him and others; and on June 5th, 1908, the Citizens' Savings Bank, which is a banking corporation duly incorporated and organized under the laws of the State of Kentucky, with its place of business located in Paducah, McCracken County, Kentucky, also instituted an action at law through its attorney, J. D. Mocquot, in the McCracken Circuit Court in McCracken County, Kentucky, in which it sought to re-
76 cover upon a note bearing date January 16th, 1908, personal judgment against T. J. Atkins for such debt, and also sued out a general attachment against the property of George C. Thomp-

son and Ed. L. Atkins which it caused to be levied on the life estate of Ed. L. Atkins in the same property aforesaid, referred to in and conveyed by the deed of December 3rd, 1906; and on August 15th, 1908, Citizens' Bank of Murray, through its attorney, J. D. Mocquot, also instituted an action in equity in McCracken Circuit Court in McCracken County, Kentucky, against George C. Thompson, Ed. L. Atkins and T. J. Atkins and others in which it sought to recover personal judgment against T. J. Atkins on a note bearing date March 14th, 1908, for $2,500.00, which was a debt created subsequent to the execution of the deed alleged on December 3rd, 1906, and in such action specifically described the property aforesaid so conveyed by such deed and therein sought to set aside the deed alleged as fraudulent and without consideration; and all of such actions were pending undetermined in the McCracken Circuit Court at the time the petition in bankruptcy against T. J. Atkins herein was filed in this court.

Petitioner further says that one of the petitioning creditors herein, American German National Bank, has procured from T. J. Atkins, the bankrupt, prior to the filing of the petition in bankruptcy, an agreement with him by which T. J. Atkins has undertaken to transfer to it all of the rents arising from such property as is described in the deed alleged, and which they claim as the life estate of T. J. Atkins reserved to him in the terms of the fraudulent deed alleged, and such petitioning creditor is now receiving such rent.

It says that in truth and in fact neither T. J. Atkins nor Ed. L. Atkins owns any life estate whatever in such property, or any part of it, as against this petitioner, or its debts sued for in the action alleged because, as alleged in such action, the deed was a fraudulent gift without any valuable consideration whatever, and fraudulent and void as against this petitioner.

Petitioner now says the petitioning creditor Owen is a near relative of the bankrupt; that the petitioner, American German National Bank is a creditor bank in which the bankrupt, T. J. Atkins, during all of the transactions alleged, and when the petition was filed, was Vice President and a Director and also a large stockholder; and also holds a large amount of valuable property transferred to it in various ways by T. J. Atkins preferring it as a creditor; that the Mechanics & Farmers Savings Bank is a creditor also who has permitted, and still permits, the use of its name as petitioning
77 creditor under the influence and direction of the American German National Bank and the creditor Owen by the regular attorneys of the American German National Bank through whom the involuntary petition in bankruptcy was filed, and petitioner charges that the petition in bankruptcy was so filed through the collusive procurement of T. J. Atkins, bankrupt; that Arthur Y. Martin, Trustee in Bankruptcy for T. J. Atkins, bankrupt, has employed attorney J. D. Mocquot to represent him as trustee, and who, as attorney for the other parties as herein alleged, represent the conflicting interests with the interest of this petitioner and the other creditors whose debts were created prior to the execution of the deed of date December 3rd, 1906, and such trustee and his attorney

refuse to permit the use of the name of the trustee, Arthur Y. Martin, in the further prosecution of its action aforesaid in the State Court or to join as co-plaintiff in such action for the preservation of the rights and equities acquired in its action for the benefit of the bankrupt's estate or his petitioner, or to permit the prosecution of its action to final judgment in the State Court, although they have been requested so to do.

Wherefore, petitioner prays a judgment of this court that it decline to entertain or exercise any jurisdiction for the setting aside of such fraudulent conveyance, and especially objects and excepts to the jurisdiction of this Court in this bankruptcy proceeding or otherwise in such matters; and it further prays this Court to permit and direct its trustee to join this petitioner as co-plaintiff in the prosecution of such action in the State Court to final judgment setting aside such fraudulent conveyance for its benefit, and for the benefit of the trust estate; and it prays that its rights and equities acquired in such action be thus fully preserved and protected in full force and effect as against T. J. Atkins and all parties claiming under or through him by this Court until such action is so prosecuted to final judgment; and until the proceeds so recovered for the benefit of this petitioner and for the bankrupt's estate and the other creditors, if any, who may be entitled to share with it in such proceeds shall have final determination and distribution of the assets of the bankrupt by this Court; or that it be permitted to make the Trustee, Arthur Y. Martin, a defendant in its action in the State Court, and be permitted to prosecute its action to final judgment under the issues therein pending; and it prays for the full protection of this Court in the preservation of its liens and equities
78 and prosecution of such action; and for all such necessary and proper relief as may be granted for such purpose by this Court.

GLOBE BANK & TRUST COMPANY,
By D. G. PARKS, *Attorney.*

The affiant, G. W. Robertson, says he is President of the Globe Bank & Trust Company, and that he believes the statements contained in the foregoing petition are true.

G. W. ROBERTSON.

Subscribed and sworn to before me by G. W. Robertson, this the 19th day of January, 1909.

[SEAL.]

W. J. PIERCE,
Notary Public, McCracken County, Ky.

My commission expires Feb. 23, 1910.

In the District Court of the United States for the Western District of Kentucky.

In Bankruptcy.

In the Matter of T. J. ATKINS, Bankrupt.

Replication.

Comes petitioner, the Globe Bank & Trust Company, for itself and other prior creditors, for reply to the response filed herein May 12, 1910, by Arthur Y. Martin, Trustee; the Bank of Murray; the Citizens Bank of Murray, and Citizens Savings Bank, to its original and supplemental petition on file herein, says it is not true, and it denies petitioner was thwarted or received no benefit or advantage by reason of its attachment and the order of this Court on its original petition herein preserving liens for the benefit of the bankrupt estate.

It says that petitioners thereby recovered the property and the proceeds of its sale under the judgment rendered in the State Court against the responding creditors who had sued out and levied attachments on the pretended life estate of Ed. L. Atkins and the pretended life estate of T. J. Atkins, claimed by them under the fraudulent deed alleged; and by such proceedings their actions in the State Court and their attachment proceedings therein so levied on such life estate were dismissed absolutely by the judgment rendered, and the proceeds in controversy were recovered and preserved under the judgment alleged by these petitioners for the benefit of the bankrupt estate, to be distributed among the creditors according to their rights and equities under the law.

It is true under section 70 of the Bankruptcy Act referred to in such response the Trustee may avoid any transfer by the bankrupt of his property which any of the creditors of the bank-
79 rupt might have avoided, and may recover the property so transferred, or its value, as provided in such section; but the Trustee under such provisions recovered and holds the property in controversy for the benefit of these petitioners under provisions of Section 1907 of our Kentucky Statutes which provides:

"Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities; but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not, therefore, be deemed to be void as to such subsequent creditors or purchasers;" and petitioner says under Section 70, supra, of the Bankruptcy Act, and under this section of the Kentucky Statutes, neither of the responding creditors nor any other creditor whose debt was created subsequent to the deed, nor the Trustee in Bankruptcy for them, could have avoided the

deed in controversy, while under such sections the petitioning creditors whose debts were created prior to such deed could and did avoid and set aside such deed for their benefit under the judgment alleged, and all such subsequent creditors were by the judgment denied any interest whatever in such property or its proceeds; and it pleads such judgment in bar of their claim; and these petitioning creditors, in equity, own all of the proceeds so recovered.

It further denies the McCracken Circuit Court had no power or jurisdiction to determine whether or not the prior creditors alone, or all the subsequent creditors as well, cou'd have the property or its proceeds alleged, or whether or not the Trustee in Bankruptcy should recover for the subsequent creditors; but it says all of such matters were submitted to the jurisdiction of the State Court by all the parties in the consolidated actions alleged, and were determined and adjudged by the judgment of such court, and the funds recovered, while vested in the Trustee, and by the judgment payable to him, inure to the benefit of these petitioners who only had a right to avoid and set aside such deed.

Petitioners further say that by such judgment of the McCracken Circuit Court so rendered, and the preservation of liens by order of this Court, the alleged life estate of T. J. Atkins described among the assets by the petitioning creditors on file herein is defeated and cannot be treated as a part of the assets of T. J. Atkins, because it
80 was thereby adjudged that he had no life estate in the property alleged; and by the judgment so setting aside the deed in controversy the entire fee-simple title therein was sold under the judgment of the State Court and the proceeds now in this Court in controversy represent the property sold under such title free of any of such life estate in T. J. Atkins; and such proceeds are insufficient to pay the debts of these petitioners, for whom they were recovered; and they plead the judgment of the McCracken Circuit Court alleged in bar of any claim by such petitioning creditors in such life estate.

They here refer to the judgment of the McCracken Circuit Court as on file in these proceedings with the Trustee's report filed herein, and also as referred to in their original and supplemental petitions on file herein, and all proceedings of such consolidated actions as therein set forth, and ask that they be read as a part of this reply, as well as a part of their original and supplemental petitions; and now, having replied, they pray as in their original and supplemental petitions, and for all necessary and proper relief.

GLOBE BANK & TRUST CO.,
By D. G. PARK, *Att'y.*

United States District Court for the Western District of Kentucky.

In Bankruptcy.

In the Matter of T. J. ATKINS, Bankrupt.

Replication.

Comes petitioners, the First National Bank of Paducah, Ky., and the Old State Bank of Evansville, Ind., for themselves and other

creditors, — for reply to the response filed herein May 12th, 1910, by Arthur Y. Martin, Trustee; the Bank of Murray, the Citizens Bank of Murray, and the Citizens Savings Bank, to *its* oirginal and supplemental petitions on file herein, says it is not true, and *it* denies, petitioners were thwarted or received no benefit or advantage by reason of *its* attachment and the order of this court on *its* original petition herein preserving liens for the benefit of the bankrupt estate. They say that the petitioners thereby recovered the property and the proceeds of its sale under the judgment rendered in the State Court against the responding creditors who had sued out and levied attachments on the pretended life estate of Ed. L. Atkins, and the pretended life estate of T. J. Atkins claimed by them under the fraudulent deed alleged; and by such proceedings their actions in the State Court and their attachment proceedings therein so levied on
81 such life estates were dismissed absolutely by the judgment rendered, and the proceeds in controversy were recovered and preserved under the judgment alleged by these petitioners for the benefit of the bankrupt estate to be distributed among the creditors according to their rights and equities under the law.

It is true under Section 70 of the Bankruptcy Act referred to in such response the Trustee may avoid any transfer by the bankrupt of his property which any of the creditors of the bankrupt might have avoided, and may recover the property so transferred, or its value, as provided in such section; but the Trustee under such provision recovered and holds the property in controversy for the benefit of these petitioners under provisions of Section 1907 of our Kentucky Statutes which provides:

"Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers."

And petitioners say under Section 70, supra, of the Bankruptcy Act, and under this section of the Kentucky Statutes, neither of the responding creditors nor any other creditor whose debt was created subsequent to the deed, nor to the Trustee in Bankruptcy for them, could have avoided the deed in controversy, while under such sections the petitioning creditors, whose debts were created prior to such deed, could and did avoid and set aside such deed for their benefit under the judgment alleged, and all such subsequent creditors were by the judgment denied any interest whatever in such property or its proceeds; and it pleads such judgment in bar of their claim; and these petitioning creditors in equity own all of the proceeds so recovered.

They further deny the McCracken Circuit Court had no power or jurisdiction to determine whether or not the prior creditors alone, or all the subsequent creditors as well, could have the property or its proceeds alleged, or whether or not the Trustee in Bankruptcy

should recover for the subsequent creditors; but *is* says all of such matters were submitted to the jurisdiction of the State Court by all the parties in the consolidated actions alleged, and were determined and adjudged by the judgment of such court and the funds recovered, while vested in the Trustee, and by the judgment
82 payable to him, inure to the benefit of these petitioners who only had a right to avoid and set aside such deed.

Petitioners further say that by such judgment of the McCracken Circuit Court so rendered, and the preservation of liens by order of this Court, the alleged life estate of T. J. Atkins described among the assets by the petitioning creditors on file herein, is defeated and cannot be treated as a part of the assets of T. J. Atkins, because it was thereby adjudged that he had no life estate in the property alleged; and by the judgment so setting aside the deed in controversy, the entire fee-simple title therein was sold under the judgment of the State Court and the proceeds now in this Court in controversy represent the property sold under such title free from any of such life estate in T. J. Atkins, and such proceeds are insufficient to pay the debts of these petitioners, for whom they were recovered; and they plead the judgment of the McCracken Circuit Court alleged in bar of any claim by such responding creditors in such life estate. And they say that said T. J. Atkins, dec'd, — the sale of said property under the judgment of the McCracken Circuit Court.

They further refer to the judgment of the McCracken Circuit Court as on file in these proceedings with the Trustee's report filed herein, and also as referred to in their original and supplemental petitions on file herein set forth, and ask that they be read as a part of this reply as well as a part of their original and supplemental petitions. And now, having replied, they pray as in their original and supplemental petitions, and for all necessary and proper relief.

OLD STATE NATIONAL BANK OF EVANSVILLE, IND.,
By WHEELER, HUGHES & BERRY, *Att'ys.*
FIRST NATIONAL BANK OF PADUCAH, KY.,
By T. L. CRICE, *Att'y.*

D. H. Hughes says he is one of the attorneys for The Old State National Bank of Evansville, Ind., a corporation; none of the officers or agents of which are now in this county, and that the foregoing statements are true.

D. H. HUGHES.

Subscribed and sworn to before me by D. H. Hughes, this May 16th, 1910.

MAMIE O'BRIEN,
Notary Public, McCracken Co., Ky.

WESTERN DISTRICT OF KENTUCKY, *ss:*

I, A. G. Ronald, Clerk of the District Court of the United States for the Western District of Kentucky, in bankruptcy at

83 Louisville, do hereby certify that the foregoing 19 pages contain true and correct copies of the Petition of the Globe Bank & Trust Company field January 20th, 1909; Reply of the Globe Bank & Trust Company to the response of Arthur Y. Martin, Trustee, filed May 13th, 1910, and the Reply of the First National Bank of Paducah, Ky., and the Old State National Bank of Evansville, Indiana, to the response of Arthur Y. Martin, Trustee, filed May 16th, 1910, in the matter of T. J. Atkins, bankrupt, as the same appears from the originals now on file in my said office.

Witness my hand and seal of said Court this 12th day of July, A. D. 1911.

[SEAL.] A. G. RONALD, *Clerk*,
By HENRY F. CASSIN, *D. C.*

2091. 2160. Supplemental Record. Filed July 22, 1911. Frank O. Loveland, Clerk. J. B. Mocquot, Attorney-at-Law, Paducah, Kentucky.

84 And afterwards towit on February 13, 1912 a decree was entered in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

Nos. 2091 & 2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of THOMAS JEREMIAH ATKINS, Bankrupt, Petitioner and Appellant,

vs.

GLOBE BANK & TRUST COMPANY et al., Respondents & Appellees.

This cause came on to be heard on a petition to review and an appeal from an order made the 16th day of July, A. D. 1910, in the matter of Thomas Jeremiah Atkins, Bankrupt, by the District Court of the United States for the Western District of Kentucky sitting as a court of Bankruptcy, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the said order of the said District Court be and the same is hereby reversed with costs and the cause is remanded to the said District Court with directions to take further proceedings not inconsistent with the opinion of this Court.

85 And on the same day, towit, February 13, 1912, an opinion was filed in said cause which is in the words and figures as follows:

Opinion.

86 Filed Feb. 13, 1912. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2091.

In the Matter of the Petition of ARTHUR Y. MARTIN, Trustee of T. J. Atkins, Bankrupt; Bank of Murray, and Citizens Savings Bank to Review an Order of the District Court of the United States for the Western District of Kentucky in the Case of Thomas Jeremiah Atkins, Bankrupt.

No. 2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of THOMAS JEREMIAH ATKINS, Bankrupt, Appellant,

v.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KY.; FIRST NATIONAL Bank of Paducah, Ky., and Old State National Bank of Evansville, Ind., Appellees.

Appeal from the District Court of the United States for the Western District of Kentucky.

Submitted January 5, 1912; Decided February 13, 1912.

Before Warrington and Knappen, Circuit Judges, and Sater, District Judge.

December 28, 1908, T. J. Atkins was, under involuntary proceedings in bankruptcy previously begun in the court below, adjudicted a bankrupt and Martin was *ap*-appointed trustee. Within four months of the commencement of these proceedings, three banks, viz., Globe Bank & Trust Co., First National Bank of Paducah, and Old State National Bank of Evansville, instituted suits in the McCracken Circuit Court at Paducah, Kentucky, against Atkins
87 (and his vendees named in the deed referred to below) to recover judgments upon claims they held against him and to set aside as fraudulent and void, the deed of conveyance just mentioned, and at the same time caused attachments to be levied upon the real estate so conveyed. Atkins delivered this deed, December 4, 1906, for the purpose of making a gift of the land described in it, to his son and his son's children. Atkins was then indebted to the three attaching banks. Two sections of the statutes of Kentucky were relied on in these suits. One was Sec. 1906, which provides that "every gift * * * of any estate, real or personal * * * made with the intent to delay, hinder or defraud creditors * * * shall be void * * *"; and Sec. 1907 provides that

"Every gift, conveyance * * * made by a debtor * * * of his estate, without valuable consideration therefor shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers". (Carroll's Ky. Stat. ed. 1903, pp. 772, 774.)

In January, 1909, the Globe Bank & Trust Co. filed two petitions in the present bankruptcy proceeding for the purpose of objecting to the right and jurisdiction of the bankruptcy court to interfere with the petitioner in its suit in the state court; in the later petition, however, it prayed that the bankruptcy court decline to entertain jurisdiction for the setting aside of the fraudulent conveyance, and permit and direct the trustee in bankruptcy to join petitioner as co-plaintiff in the prosecution of the action in the state court to set aside "such fraudulent conveyance for its benefit, and for the benefit of the trust estate; * * *

February 23, 1910, the court below made an order providing, among other things, that any right or lien acquired by the attachment, lis pendens, or otherwise, upon the property of the bankrupt involved in the action pending in the McCracken Circuit Court, "be, and the same shall, until the further order of the Court herein, be preserved for the benefit of the bankrupt's estate as provided in Section 67*f* of the Bankruptcy Act"; and directing that the trustee, either on his own motion or the order of the referee, apply to the Circuit Court for leave to be made a party to the action for
88 the purpose of making the lien or right available for any creditors of the bankrupt, who may show a right to share in any funds acquired in the action. April 8, 1909, the referee made an order authorizing the trustee to institute an action in the McCracken Circuit Court to recover the property, and also to have himself substituted as plaintiff in any of the actions that had theretofore been brought in that court by creditors of the bankrupt's estate for like recovery.

April 9, 1909, the trustee commenced an independent suit in the Circuit Court to set aside the deed of conveyance mentioned, which, by order of that court, was consolidated with the actions of the three creditor banks. Upon issues joined, judgment was entered in June, 1909, holding that the deed was without valuable consideration and was voluntary and constructively fraudulent and void as against the debts sued on by the banks; and that they were entitled to recover in sums stated, which were liabilities of the bankrupt at the time of the delivery of the deed, but dismissing the actions as to creditors whose claims accrued subsequently to the delivery of the deed, and also dismissing the action of the trustee so far as it sought to set aside the deed for the benefit of creditors of the bankrupt estate, whose debts were created after the execution of the deed. Sale of the property was ordered and the commissioner was directed to collect the proceeds and hold them subject to the final orders of the

court "in the further and final disposition of such proceeds, or subject" to the order of the bankruptcy court in the present bankruptcy proceeding. The trustee in bankruptcy was appointed by the court as commissioner to execute the judgment.

The causes were taken by the trustee and others (among whom were the grantees in the conveyance in dispute), to the Court of Appeals of the State of Kentucky. A copy of its opinion appears in the record, and the case is reported in 124 S. W. 879. For the purpose of pointing out the true scope and intent of the judgments of the state courts, we quote from the opinion of the Court of Appeals. When passing upon the appeal of the trustee, the Court said (881):

"The judgment does not undertake to dispose of the proceeds that may be realized from the sale of the property, but leaves this question open for future determination, and we do not doubt that when the Court comes to make an order concerning the disposition
89 of the proceeds in the hands of the Trustee as Special Commissioner, it will direct that the proceeds be paid over to the Trustee in Bankruptcy to be administered as a part of the estate of the bankrupt in the bankruptcy court. In anticipation of what we assume the Court will do, we may, with propriety in this opinion, direct that it make such orders. If the Court in the judgment had undertaken to divert (divest) the Trustee of the control of this fund, we would upon this point reverse the judgment, with directions to proceed as indicated, but as the Court did not make such an order, we are of the opinion that on the appeal of the Trustee the judgment of the lower court should be affirmed."

On the appeal of the grantees in the deed of conveyance, the judgment was reversed because of error in fixing the date of delivery of the deed, the court saying (881):

"To what extent this will affect the judgment creditors, we are not advised; but only those creditors whose debts were created previous to December 4, 1906 (date of delivery of deed) are entitled to participate in the proceeds realized from the sale of the property. If the proceeds amount to more than sufficient to pay such debts, the surplus should be paid to the grantees in the deed."

Under the mandates of the Court of Appeals, the Circuit Court entered judgment in favor of the banks, in the same sums as were entered in its judgment of June, 1909, before alluded to, except that it reduced the amount of the judgment of the Globe Bank to the extent of $1,285 which represented indebtedness incurred by the bankrupt subsequently to the date of the deed in question. It was further adjudged that as to all other debts, including those represented in the consolidated actions by the trustee in bankruptcy, the "deed is not fraudulent but is valid as provided and adjudged in the former judgment rendered in these consolidated actions on June 19, 1909, as aforesaid, and that no trust for the payment of any of such debts so created subsequent to the deed is herein declared or adjudged.

"It is now further adjudged that the proceeds arising from the sale of the property described in the former judgment rendered June

19, 1909, aforesaid, shall be held by Arthur Y. Martin, Trustee, and as Special Commissioner of this Court under the terms and directions of such former judgment until disposed of and distributed as is directed in such judgment."

90 The banks having proved their claims (setting up their actions as liens, etc.) in the bankruptcy proceeding, the referee on May 23, 1910, entered an order finding that those banks were the only creditors of the bankrupt whose claims were existing at the date of the delivery of the deed, and that the proceeds derived from the sale of the property conveyed by the deed were insufficient to pay their debts; and that they were entitled to the entire fund, and directed the trustee to pay the same to them pro rata upon their respective debts. Upon petition of the trustee for review, this order was affirmed, the court below being of opinion that the voluntary conveyance, though void as to the then existing creditors of the bankrupt, was not so as to creditors whose debts were created after the date of the deed; also

"that the lis pendens liens and the attachments in the suits in the State Court were, under the order of this Court, entered herein on February 18, 1909, preserved for the benefit of the estate;" further "that the construction of the Kentucky Statutes by the Court of Appeals in the cases referred to is binding upon this Court, even if it did not (as it does) agree with that decision."

WARRINGTON, *Circuit Judge* (after stating the facts as above):

The question presented for our decision is whether the order of distribution is correct. The order provides that the proceeds, $16,146.58, derived from the sale of property conveyed by the bankrupt, shall be paid pro rata upon the claims alone of the three banks. While the order was made in the matter of the bankruptcy of T. J. Atkins, two cases nominally are docketed in this court by the trustee; one on appeal and the other by petition to revise in matter of law. Since the cases are based on the same order and no objection is made by either side touching the remedies so chosen to bring the question into this court, we need not concern ourselves with any question of remedy or jurisdiction. Beiser v. Western German Bank 167 Fed. 486, (C. C. A. 6th Cir.); In re Worcester County, 102 Fed. 808, 811 (C. C. A. 1st Cir.).

Was the court below, as respects its order of distribution, bound by the judgments of the state courts, or did those courts intend them to have such effect? As pointed out in the statement, the Court of Appeals held that the judgment of the McCracken Circuit Court did not undertake to dispose of the proceeds of sale, and it had

91 no doubt that when that court came to make an order concerning the disposition of the proceeds, it would direct that they be paid over to the trustee in bankruptcy "to be administered as a part of the estate of the bankrupt in the bankruptcy court;" and in anticipation of what the Court of Appeals assumed that the court below would do, it (the Court of Appeals) described that it might "with propriety in this opinion, direct that it (the court be-

low) make such orders." It was then stated: "If the court (below) in the judgment had undertaken to divert (divest) the trustee of the control of this fund, we would upon this point reverse the judgment, with directions to proceed as indicated."

It is true that when passing upon the appeal of the grantees in the deed in question, the court did say that only those creditors whose debts were created prior to the delivery of the deed were entitled to participate in the proceeds realized from the sale of the property. The court of course did not know at that time whether the aggregate claims of the banks would or would not exhaust the property covered by the deed, for the property had not been sold. The essence of this portion of the opinion, as it seems to us, is a statement of the extent to which the Atkins land, or the proceeds derived from a sale, could be *sized* and applied to the payment of creditors, and of the disposition that should be made of any surplus that might remain. We are unable to perceive any other way to reconcile the position taken by the court when stating its reasons for not reversing the judgment upon the appeal of the trustee, with its conclusion that the surplus should be turned over to Atkins' grantees.

When we come to consider the judgment entered by the state circuit court under the decision of the Court of Appeals, ordering, among other things, that the proceeds of sale should be held by the trustee in bankruptcy as special commissioner of the state court under the terms of its former judgment "until disposed of and distributed as directed in such judgment," we are brought to an inquiry into the meaning of its former judgment. The commissioner was directed by that judgment to hold the proceeds subject to the final orders of the court

"or subject to the District Court of the United States * * * under its final distribution of the entire assets of the estate of such bankrupt * * * and the rights of all creditors in such
92 bankrupt proceedings in the distribution or disposition of such proceeds by the bankrupt court are hereby reserved and not determined but left open for final adjudication among them in such proceedings in bankruptcy."

The Court of Appeals, as stated, declined to reverse this judgment because it had no doubt that the court below would "direct that the proceeds be paid over to the trustee in bankruptcy to be administered as a part of the estate of the bankrupt in the bankruptcy court." We are disposed to believe that the true construction of these two judgments of the state Circuit Court, is the same as that which the Court of Appeals placed on the first judgment. This is made clear by what has been done. The trustee on June 20, 1910, reported to the Bankruptcy Court that he had in his hands the balance for distribution of cash and sale bonds received from the sale of this property, and prayed the court to adjudge to whom he should pay the proceeds; whereupon the court ordered the bonds *into* his hands to be collected and the proceeds to be held by him subject to the future orders of the court.

Now, in determining how this fund must be distributed in the

bankruptcy court, it will not do simply to consider the statute of the State of Kentucky on which reliance is placed by the banks. We must also consider the authorities which hold that the bankruptcy law is a law in that state, as also in the several states, and is just as binding on the citizens and courts thereof as are the state laws. Thompson v. Ragan, 117 Ky., 577, 581; Bank of Columbia v. Overstreet, 73 Ky. 148, 150-1; Claflin v. Houseman, Assignee, 93 U. S. 130, 136; indeed the bankruptcy law is paramount; and the jurisdiction of a bankruptcy court as regards matters rightly brought therein, is exclusive. In re Watts & Sachs, 190 U. S. 1, 27; Acme Harvester Co. v. Beekman Lum. Co., 222 U. S. 307; Mondou v. N. Y. N. H. & H. R. R. Co., decided by Supreme Court, January 15, 1912.

It will be borne in mind that the banks in whose favor the order of distribution was made, commenced their actions and caused attachments to be levied within four months of the filing of the petition in bankruptcy against Atkins. The only liens that any of these banks ever secured upon the property described in the deed in dispute, were obtained within that period or during the pendency of the bankruptcy proceedings. It is not claimed that the
93 statute (quoted in the statement) under which the deed was set aside, created a lien. The most in this respect that can be said of Atkins' delivery of the deed of gift is, that it created in each of the banks a right of action. In re Huxoll, decided by this court February 13, 1912, and cases there cited; Carroll's Ky. Stat., 1899, Sec. 1907*a*, p. 756. Sec. 67*f* of the Bankruptcy Act provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

Paragraph *c* of that section also treats of liens created by attachment on mesne process and provides for their preservation, and in the last clause enacts:

"* * * if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

As pointed out in the statement, the court below made an order providing that any right or lien acquired by attachment, lis pendens

or otherwise "be, and the same shall, until the further order of the Court herein, be preserved for the benefit of the bankrupt's estate as provided in Section 67*f* of the Bankruptcy Act."

Thus, the effect of the bankruptcy proceedings to dissolve the attachments was avoided. None of the attaching creditors made any objection to the order, and indeed the Globe Bank had (as appears in the statement) asked for an order for its benefit and also that of the trust estate.

94 In First National Bank v. Staake, 202 U. S. 141, Justice Brown, having occasion to consider the portion of Section 67*f* under which this order of the court below was made, said (146):

"* * * so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors, that is, 'for the benefit of the estate'; in other words, the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors."

This court followed that construction in Re Kohler, 159 Fed. 871. After referring to First National Bank v. Staake, Judge Richards speaking for the court said (874):

"Here certain attachments had been levied within four months. The court held they could be annulled, or the lien of the attachments could be preserved under the bankruptcy act for the benefit of the estate. There was no method suggested of passing over the property covered by these attachments to the creditors who had secured them."

See also First National Bank v. Guaranty Title & Trust Co., 178 Fed. 187, 192, (C. C. A. 3d Cir.); Rock Island Plow Co., v. Reardon, Trustee, decided by United States Supreme Court, January 9, 1912.

If these decisions are applicable to the instant case, it is plain that the rights of the banks under their suits and attachments were, through Section 67*f* and the order of the bankruptcy court, passed to the trustee for the benefit of the bankrupt's estate, subject to the power of the bankruptcy court to cause either the property or the proceeds of sale to the extent that they were affected by the suits and attachments, as well as the judgements, to be administered for the equal benefit of all the creditors of the bankrupt.

It is insisted, however, that these decisions are not relevant, because under Section 1907 of the Statutes of Kentucky the deed was valid, except as to those creditors whose debts were existing at the date of its delivery; and that, since the banks were the only creditors of that class who obtained liens through the commencement of suits and levies of attachments, the benefits of such liens cannot be extended to any one else. The portions of the bankruptcy
95 act which we have quoted and which were passed on in the decisions cited, do not make any such distinction as this. Those provisions of the act are broad and comprehensive. Section 67*c* embraces: "A lien created by or obtained in or pursuant to any suit * * * including an attachment upon mesne process which was begun against a person within four months * * *"; and Section 67*f* includes: "All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is

insolvent, at any time within four months * * *" As respects liens so acquired within the four months, it is difficult to conceive of language of wider scope than this. It is not claimed that Atkins was not insolvent at the time these suits were commenced and the attachments levied, and the reason for this is obvious. Atkins was adjudicated a bankrupt within the next succeeding four months, and the present controversy leaves no room for doubt as to his insolvency at the date of the suits and attachments. If the distinction urged on behalf of the banks were sound, it is hard to perceive why it would not be applicable to every case where some of a body of creditors, who all admittedly have equal rights, are more diligent than the others in securing liens through attachments or any of the other means stated in 67*c* and *f;* for all the practical results and hardships among the creditors would in that event be identical with those complained of here. It is plainly within the power of Congress to enact that liens so acquired within a specified period should, through bankruptcy proceedings, be applied to the common benefit of all the creditors of a bankrupt. As Justice Brown said in First National Bank v. Staake, (148):

"To what extent liens obtained by prior judicial proceedings shall be recognized is a matter wholly within the discretion of Congress."

The learned justice answered an argument that Section 67*f* refers only to liens upon property which, if such liens were annulled, would pass to the trustee of the bankrupt. The basis of the argument was that but for the attachment the property covered by the unrecorded deed of Baird to the Roanoke Furnace Company would pass to the Company; and, after recognizing that the argument was perhaps justified by the decision in Hewitt v. Berlin Machine Works, 194 U. S. 296, the justice said (Staake case, 149):

96 "But the extent to which the bankruptcy court shall recognize the rights obtained by creditors upon property attached as the property of the bankrupt, though in fact such property had been conveyed by an unrecorded contract, is a matter solely within the discretion of Congress. The liens acquired in this case were liens upon property, which as to attaching creditors was the property of the bankrupt, and Congress may lawfully insist that it shall be reckoned as a part of his estate, and pass to the trustee."

So the insistence that Atkins' deed was operative as against him is futile in a case like this. It is admitted that the deed was voidable from its inception as against Atkins' then existing liabilities, although it was not necessarily so as to creditors whose debts were thereafter contracted. The property and the deed conveying it were in this plight at the time the banks commenced their suits and caused their attachments to be levied; and, consequently, the liens acquired through the suits and the attachments were upon property which, as to the attaching creditors, was the property of the bankrupt, and so fell within the provisions of Section 67*f*. We must therefore reckon with the operation and effect of the provisions of Section 67*f* upon the property, which was held under these conditions; and Atkins' grantees and the three creditor banks were,

from the time of the registration of the deed, chargeable with knowledge of the operation and effect of these provisions of the bankruptcy act. Conceding that the banks could through legal proceedings have secured the exclusive application of the property and its proceeds toward the payment of their debts four months or more prior to the beginning of bankruptcy proceedings, still, since those creditors chose to delay the exercise of their rights until they reached a time within the four months' period, they are met with the difficulty that through those proceedings their rights respecting the property or its proceeds passed to the trustee for the benefit of all the creditors.

In Clark v. Larremore, 188 U. S. 486, conditions similar in principle to those we are now considering were passed upon. There a sheriff had sold property on execution, but before paying the money to the judgment creditor, though still within the time allowed for return of the execution, bankruptcy proceedings were begun against the judgment debtor. It was held that the money did not belong to the judgment creditor and that under
97 67*f* the right to it passed to the trustee in bankruptcy. In the course of the opinion Justice Brewer said respecting the effect of the bankruptcy proceedings (489):

"They took away the foundation upon which the rights of the creditor, obtained by judgment, execution, levy and sale, rested. The duty of the sheriff to pay the money over to the judgment creditor was gone and that money became the property of the bankrupt, and was subject to the control of his representative in bankruptcy."

The only perceivable difference between the controlling principle of that case and the present case is, that the trustee in bankruptcy there was not, as the trustee here was, a party to the case in which the judgment was recovered. Does this difference amount to a material distinction? We think that the mission and authority of the trustee to enter the McCracken Circuit Court, were simply to recover the portion or the proceeds of the bankrupt's estate that were open to recovery on the part of creditors of the bankrupt; and that the proceeds recovered in virtue of the rights of such creditors were to be brought into possession of the bankruptcy court for distribution according to the bankruptcy act. Indeed, with the commencement of the bankruptcy proceeding the control of the property and the purpose to which it should be applied were fixed and declared by the bankruptcy act itself, so far as the property was affected by the liens in dispute. Acme Harvester Co. v. Beekman Lum. Co., supra, (307); First National Bank v. Staake, supra. The fact, therefore, that the trustee was a party to the state suit cannot operate to change these conditions.

In Miller v. New Orleans Fertilizer Co., 211 U. S. 496, a question arose in a bankruptcy proceeding against a copartnership, touching the distribution of assets belonging to one of the individual members of the firm. It was pointed out by the present learned Chief Justice that while under the law of Louisiana the creditors of a partnership are as to firm assets given preference over creditors of

individual members of a firm, yet that partnership creditors and creditors of the individual partners have equal rights in the individual assets. Of course this last feature is opposed to the corresponding feature of the bankruptcy act. The trustee in bankruptcy brought an action in a state court to annul any transactions affecting the property of the bankrupts, and to recover judg-
98 ment for the benefit of the bankrupt estate. Certain other actions were then pending in the state court to recover upon claims held against the firm and for the further purpose of having certain sales of property set aside and the proceeds applied to the payment of their claims, which sales had been made by one member of the firm of his individual property. The trustee was by order of the state court substituted as party plaintiff in those suits in his capacity as trustee of the bankrupt estate. In the course of the opinion it was said (505):

"Assuming, therefore, that the trustee was properly authorized, it follows that he was entitled to preserve and enforce the privilege or lien, which arose in favor of the creditors, resulting from their pending action, even although the cause of action arose from the state law, and the application of that law was essential to secure the relief sought. To the accomplishment of this end the bankrupt law was cumulative and did not abrogate the state law."

Recalling the difference between the law of Louisiana and the bankruptcy act touching the distribution of assets belonging to individual members of a Louisiana partnership, the following we think is controlling (506):

"In view of the distinction between the estates of partnerships and the estates of the members of the firm, which is made by the bankrupt law, and the method of distribution for which that law provides, of course the trustee will hold the fund as an asset of the estate of the individual member, and primarily for the benefit of his creditors."

Further, upon the question of distribution, the learned justice recognized the power of the state court to pass upon the question of preference, but denied its right to determine what creditors were to participate in the distribution. He said (506):

"The one (the question of preference) was within the province of the state court for the purpose of the case before it; the other (the matter of distribution) was a different question, depending upon independent considerations exclusively cognizable in the bankruptcy court"; and since the state court had itself so decided, its judgment was affirmed.

It is not necessary to pass upon any of the other questions presented. We are constrained to hold that the order must be reversed, and the cause remanded for further proceedings consistent with this opinion.

99 And afterwards towit on March 12, 1912, a mo- to modify and extend decree and opinion was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2091.

In the Matter of the Petition of ARTHUR Y. MARTIN, Trustee of T. J. Atkins, Bankrupt; Bank of Murray, and Citizens Savings Bank to Review an Order of the District Court of the United States for the Western District of Kentucky in the Case of Thomas Jeremiah Atkins, Bankrupt.

#2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY; FIRST National Bank of Paducah, Kentucky, and Old State National Bank of Evansville, Indiana, Appellees.

In Bankruptcy.

Appeal from the District Court of the United States for the Western District of Kentucky.

Motion to Vacate, Modify, and Extend Decree and Opinion Rendered on the 13th Day of February, 1912.

GLOBE BANK & TRUST COMPANY and FIRST NATIONAL BANK OF PADUCAH, KENTUCKY, Appellants,

vs.

ARTHUR Y. MARTIN, Trustee of Thomas Jeremiah Atkins, Bankrupt; Bank of Murray, Citizens Bank of Murray, and Citizens Savings Bank, Appellees.

100 Appellants move the Court to vacate former decree and modify with an extension directing what specific judgment shall be rendered in the Court below under its mandate of reversal; and also file such a decree or opinion as will make and file by the court its separate finding of facts and its conclusions of law thereon, stated separately, as required in Order or Rule No. 36 for an appeal to the Supreme Court of the United States; and that the decree rendered herein on February 13th 1912, be so modified and extended so that instead of reversing the case and remanding it for further proceedings, the cause be remanded with directions to enter specific judgment of distribution in accordance with the opinion rendered so as to make such decree of this Court final and a subject matter of an appeal to the Supreme Court of the United States; and that its appeal be granted as prayed for in their pending motion filed March 11th 1912.

GLOBE BANK & TRUST CO.,
By D. G. PARK, *Attorney.*
FIRST NATIONAL BANK OF PADUCAH,
By D. G. PARK, *Attorney.*

And on the same day towit March 12, 1912, said motion was submitted to the Court in the words and figures as follows:

101 United States Circuit Court of Appeals for the Sixth Circuit.

#2091.

In re Petition of ARTHUR Y. MARTIN, Trustee for Review,

and

#2160.

ARTHUR Y. MARTIN, Trustee, etc.,
vs.
GLOBE BANK & TRUST CO. et al.

Motion to modify decree, etc., is submitted to the Court.

And afterwards towit on March 13, 1912, an order setting motions for hearing was entered which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2091.

In the Matter of the Petition of ARTHUR Y. MARTIN, Trustee, et al., for Review in the Case of Thomas Jeremiah Atkins, Bankrupt,

and

#2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,
vs.
GLOBE BANK & TRUST CO. et al., Appellees.

Motion for order allowing appeal to be rendered in open Court having been filed March 11th 1912, and a motion to vacate, modify and extend decree and opinion rendered on the 13th day of February 1912, having been filed March 12th 1912, it is now
102 here ordered that these motions be heard on the first day of the April Session upon notice given to opposing counsel under the rules of this Court, and counsel will be heard ten minutes on each side if desired.

It is further ordered that the mandate of this Court be withheld until these motions are heard and disposed of by this Court.

WARRINGTON, *Cir. J.*

And afterwards towit on April 2, 1912, an entry was made upon the Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2091.

In re Petition of ARTHUR Y. MARTIN, Trustee, et al., for Review,

and

#2160.

ARTHUR Y. MARTIN, Trustee, etc.,
vs.
GLOBE BANK & TRUST CO. et al.

Motions to modify decree in this cause and grant an appeal to the Supreme Court of the United States are argued by Mr. D. G. Park for the motions and by W. F. Bradshaw contra and are submitted.

And afterwards towit on July 19, 1912, an order was entered in said cause in the words and figures as follows:

103 United States Circuit Court of Appeals for the Sixth Circuit.

#2091.

In the Matter of the Petition of ARTHUR Y. MARTIN, Trustee, et al., for Review in the Case of Thomas Jeremiah Atkins, Bankrupt,

and

#2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,
vs.
GLOBE BANK & TRUST CO. et al., Appellees.

These cases are set for hearing, on briefs and oral argument, on the question of remedy, at the October 1912 Session next after the cases already advanced to be heard at that session.

WARRINGTON, *Cir. J.*

And afterwards towit on September 19, 1912, a motion to dismiss the cause was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2091.

In the Matter of the Petition of ARTHUR Y. MARTIN, Trustee of T. J. Atkins, Bankrupt; Bank of Murray, Citizens Bank of Murray, and Citizens Savings Bank to Review an Order of the District Court of the United States for the Western District of Kentucky in the Case of Thomas Jeremiah Atkins, Bankrupt,

and

104 #2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KY.; FIRST NATIONAL Bank of Paducah, Ky., and Old State National Bank of Evansville, Ind., Appellees.

Appeal from the District Court of the United States for the Western District of Kentucky.

Motion to Dismiss Cases for Lack of Jurisdiction.

The respondents in Case No. 2091 on Petition for review above entitled, Globe Bank & Trust Company, and First National Bank of Paducah, Ky., and Old State National Bank of Evansville, Ind., come by counsel and, pending the Petition for Rehearing heretofore filed, move the United States Circuit Court of Appeals for the Sixth Circuit, to dismiss Case No. 2091 on Petition for Review aforesaid, to review an order or decree of the District Court of the United States for the Western District of Kentucky in Case of T. J. Atkins, Bankrupt, rendered July 16, 1910, because they say that this Court has no jurisdiction to review or reverse such decree on petition for review as presented and sought in this Court by the Petitioners for review; and they pray the Court to determine such question
105 of jurisdiction before it acts upon any of the other motions herein pending in such cause; and they say that the decree of the District Court aforesaid is not the subject matter of a petition for review and cannot be modified or reversed in such proceeding for lack of jurisdiction in this Court to consider or adjudge the matters arising in the proceedings in the District Court in which such decree was rendered; and they herewith file notice duly served upon the petitioners for review herein which they pray to be considered by the Court as a part of this motion.

Appellees, Globe Bank & Trust Company and First National Bank of Paducah, Ky., and Old State National Bank of Evansville, Ind., in the case No. 2160 above entitled, come by their counsel into this

Court in such cause and, pending the petition for Rehearing, move the United States Circuit Court of Appeals, Sixth Circuit, to dismiss appeal case No. 2160 aforesaid, for lack of jurisdiction in this Court to hear or determine such appeal, or to review or to reverse the decree of the District Court of the United States for the Western District of Kentucky rendered July 16, 1910, sought to be
106 reviewed in such appeal case; and they say that such appeal was not applied for or prayed for until Nov. 28, 1910, and no order was made or attempted to be made, and the order purporting to grant the appeal was never made until Jan. 31, 1911, and that such order granting the appeal is void because such appeal was not prayed for or granted within time to confer upon this Court any jurisdiction to review or reverse such decree; and they further say that the trustee, Arthur Y. Martin has no power or authority as such to prosecute the appeal from such decree; and the matters in controversy adjudged by such decree are such that this Court has no jurisdiction to review or reverse such decree, in the case No. 2160 aforesaid as it appears in this Court; and they pray the Court to determine and adjudge such question of jurisdiction before they act upon any other motions pending in this Court in such cause; and they file herewith notice duly served upon the appellant and ask that it be considered and heard as a part of this motion. All of which is respectfully submitted.

GLOBE BANK & TRUST COMPANY,
By D. G. PARK, *Attorney.*
FIRST NATIONAL BANK OF PADUCAH,
By D. G. PARK, *Attorney.*

Received of D. G. Park, Attorney, copy of the within motion Sept. 11, 1912.

BRADSHAW & BRADSHAW,
Att'ys for Martin, Trustee.
J. D. MOCQUOT,
Att'y for Citz. Sav. Bank, Citz. Bank of Murray, Bank of Murray.

107 United States Circuit Court of Appeals for the Sixth Circuit.

#2091.

In the Matter of the Petition of ARTHUR Y. MARTIN, Trustee of T. J. Atkins, Bankrupt; Bank of Murray, Citizens Bank of Murray, and Citizens Savings Bank to Review an Order of the District Court of the United States for the Western District of Kentucky in the Case of Thomas Jeremiah Atkins, Bankrupt.

#2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KY.; FIRST NATIONAL Bank of Paducah, Ky., and Old State National Bank of Evansville, Ind., Appellees.

Appeal from the District Court of the United States for the Western District of Kentucky.

Notice of Motion.

To Arthur Y. Martin, Trustee of T. J. Atkins, Bankrupt; Bank of Murray, Citizens Bank of Murray, and Citizens Savings Bank, and Their Attorneys, J. D. Mocquot and W. F. Bradshaw, Jr.:

You and each of you are hereby notified that the Globe Bank & Trust Company and the First National Bank of Paducah, Ky., and the Old State Bank of Evansville, Ind., as respondents in case No. 2091 above entitled and appellees in case No. 2160 above entitled, will on the first day of the October term of 1912, in the

108 United States Circuit Court of Appeals for the Sixth Circuit, to be held at Cincinnati, Ohio, enter motion and move the Court, pending the petition for a rehearing and pending a motion to vacate and modify its order of decree of reversal rendered Feb. 13, 1912; and to grant an appeal to the Supreme Court of the United States, to dismiss case No. 2091 aforesaid, for lack of jurisdiction in the Court to entertain or determine or adjudge such cases on petition for review because the decree of the District Court of the United States for the Western District of Kentucky rendered July 16, 1910, sought to be reviewed and reversed therein is not the subject matter of such a petition for review; and the Court had no jurisdiction to reverse such decree in such proceeding, and they will move the Court on such petition for rehearing, to dismiss such proceedings for lack of such jurisdiction.

Such respondents and appellees in above entitled case No. 2160, at the same time and place, pending the petition for rehearing heretofore filed therein and pending motions to vacate and modify judg-

ment of reversal rendered Feb. 13, 1912 and grant appeals
109 to the Supreme Court of the United States heretofore filed therein, will also move the United States Circuit Court of Appeals, upon a petition for rehearing, to vacate and modify its judgment of reversal aforesaid and to dismiss appeal case No. 2160 aforesaid for lack of jurisdiction in the appellate Court and to entertain or determine or to judge such appeal; and because the decree of the District Court of the United States for the Western District of Kentucky sought to be reversed on such appeal was rendered July 16, 1910, in such District Court while no appeal was applied for or prayed for therefrom until November 28, 1910, and no effort was made to grant such appeal until January 31, 1911, and the order purporting to grant such appeal was not made until such date and for this further reason the United States Circuit Court of Appeals has no jurisdiction; and because they further say the decree of such District Court is not the subject matter of an appeal by the Trustee, Arthur Y. Martin therefrom to the United States Circuit Court of Appeals; and for each and all such reasons they will then move the United States Circuit Court of Appeals to dismiss the appeal case No. 2160 aforesaid; of all which you will
110 please take notice.

GLOBE BANK & TRUST COMPANY,
By D. G. PARK, *Attorney.*
FIRST NATIONAL BANK OF PADUCAH,
By D. G. PARK, *Attorney.*

The foregoing notice was this day by me executed in full upon Arthur Y. Martin, Trustee in Bankruptcy for T. J. Atkins, Bankrupt, by delivering to him a true copy of such notice; and executed by me in full on the Citizens Savings Bank by delivering to W. F. Paxton, President of such Bank, a true copy of such notice.

G. W. LONG,
United States Marshal for the Western District of Kentucky,
By ELWOOD NELL,
Deputy Marshal.

This the 14th day of Sept., 1912.

Service of the foregoing notice is hereby accepted by the Bank of Murray and Citizens Bank of Murray, a true copy of such notice having been delivered to them thru their attorney of record, J. D. Mocquot and their signatures to such acceptance is duly subscribed thereto by such attorney.

This the 14th day of Sept., 1912.

CITIZENS BANK OF MURRAY,
BANK OF MURRAY,
By J. D. MOCQUOT, *Att'y.*

And afterwards towit on October 7, 1912, an order setting aside appeals heretofore allowed was entered which reads and is as follows:

111 United States Circuit Court of Appeals for the Sixth Circuit.

#2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,
vs.
GLOBE BANK & TRUST COMPANY OF PADUCAH, KY.; FIRST NATIONAL BANK OF PADUCAH, KY., and OLD STATE NATION- —.

Appeal from the District Court of the United States for the Western District of Kentucky.

To the end that the question of remedy upon which this case was set for hearing as provided by order made herein July 19, 1912, may be preserved pending such hearing, the appeals heretofore allowed in this cause are hereby set aside.

WARRINGTON, *Cir. J.*

And afterwards towit on October 9, 1912, an entry was made upon the Journal of said Court in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2091.

In re Petition of ARTHUR Y. MARTIN, Trustee, et al., for Review,

and

ARTHUR Y. MARTIN, Trustee, etc.,
vs.
GLOBE BANK & TRUST Co. et al.

Before Warrington, Knappen, and Denison, C. J. J.

These causes are argued on the question of remedy by Mr.
112 D. H. Hughes for the respondents and appellees and by Mr. W. F. Bradshaw for the petitioner and appellant and are continued until tomorrow for further argument.

And afterwards towit on October 10, 1912, an entry was made upon the Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2091.

In re Petition of ARTHUR Y. MARTIN, Trustee, et al., for Review,

and

#2160.

ARTHUR Y. MARTIN, Trustee, etc.,
vs.
GLOBE BANK & TRUST CO. et al.

These causes are further argued by Mr. W. F. Bradshaw for the Petitioner and appellant and by Mr. D. H. Hughes for the respondents and appellees and are submitted to the Court.

And afterwards towit on October 16, 1912, a stipulation as to proof of claim was filed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2091.

In the Matter of the Petition of ARTHUR Y. MARTIN, Trustee of Thomas Jeremiah Atkins, Bankrupt, to Review or Reverse an Order of the District Court of the United States for the Western District of Kentucky in the Case of Thomas Jeremiah Atkins, Bankrupt.

113 Case No. 2160.

United States Circuit Court of Appeals for the Sixth Circuit.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,
vs.
GLOBE BANK & TRUST COMPANY OF PADUCAH, KY., and OLD STATE National Bank of Evansville, Ind., and First National Bank of Paducah, Ky., Appellees.

Appealed from the District Court of the United States for the Western District of Kentucky.

Stipulation.

It is hereby agreed and stipulated in the above entitled cases on petition for review and on appeal by Arthur Y. Martin, Trustee of Thomas Jeremiah Atkins, Bankrupt, petitioner in No. 2091 and

appellant in No. 2160 by their attorneys of record herein, J. D. Mocquot and Bradshaw & Bradshaw, and the Globe Bank & Trust Company of Paducah, Ky., Old State National Bank of Evansville, Ind., and First National Bank of Paducah, Ky., respondents in No. 2091 and appellees in No. 2160 by their attorneys of record herein, Wheeler & Hughes:

That no order was made or appears in this bankruptcy proceeding in the original record in the office of the referee or of the
114 District Court where the proceedings in bankruptcy were instituted allowing or disallowing any of the claims filed by the respondents and appellees, either in respect of their original proofs of claim, or of any of the amended proofs or petitions of said banks, except the order of the referee of date of May 23, 1910, which appears at pages 56, 57 and 58 of the record.

And it is further agreed by the parties hereto that this stipulation shall be considered as a part of the record in the two above entitled cases.

In witness whereof the parties have by their attorneys hereto subscribed their names.

ARTHUR Y. MARTIN,
Trustee of T. J. Atkins, Bankrupt,
By J. D. MOCQUOT.
BRADSHAW & BRADSHAW,
Attorneys.
GLOBE BANK & TRUST CO. OF PADUCAH, KY.,
OLD STATE NATIONAL BANK OF EVANSVILLE, IND.,
FIRST NATIONAL BANK OF PADUCAH, KY.,
By WHEELER & HUGHES, *Attorneys.*

And afterwards towit on November 7, 1912, an order was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

In Bankruptcy.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,
vs.
115 GLOBE BANK & TRUST COMPANY OF PADUCAH, KY.; FIRST National Bank of Paducah, Ky., and Old State National Bank of Evansville, Ind., Appellees.

Appeal from the District Court of the United States for the Western District of Kentucky.

This cause came on further to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, as follows:

(1.) That the motion of appellees to dismiss the appeal herein for lack of jurisdiction in this court to hear or determine such appeal is, for reasons stated in the opinion this day filed, denied.

(2.) That the joint motion heretofore made by the appellees to vacate the former decree and modify same as herein entered February 13, 1912, for the purpose of making same a final order so as to be appealable from this Court to the Supreme Court of the United States, be and such motion hereby is granted and such former decree is hereby vacated and set aside. The decree of the Court
116 below in this cause is, however, hereby reversed with costs, and the cause is remanded with directions to the court below to enter and carry into execution a decree of distribution in accordance with the opinion entered herein February 13, 1912, and not otherwise.

(3.) That the petition for rehearing heretofore filed by the appellee is hereby denied.

(4.) Motion heretofore filed by the appellees for separate findings of fact and conclusions of law is, for reasons expressed in the opinion this day filed, hereby denied.

(5.) Motion of D. G. Park to strike his name from the above entitled cause as counsel for the Globe Bank & Trust Company and the First National Bank of Paducah, Ky., be and such motion hereby is granted.

Ordered, further, that the opinions of this Court as rendered and filed herein February 13, 1912, and November 7, 1912, respectively, be and the same hereby are made part of the record, and that they be so certified in making up any transcript of the record herein.

WARRINGTON, *Cir. J.*

117 And on the same day towit November 7, 1912, an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

118 Filed Nov. 7, 1912. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

Nos. 2091 and 2160.

In the Matter of the Petition of ARTHUR Y. MARTIN, Trustee of T. J. Atkins, Bankrupt, et al.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,

v.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KY.; FIRST National Bank of Paducah, Ky., and Old State National Bank of Evansville, Indiana, Appellees.

Petition to Revise and an Appeal from an Order of the District Court of the United States for the Western District of Kentucky.

Submitted October 10, 1912; Decided November 7, 1912.

Before Warrington, Knappen, and Denison, Circuit Judges.

WARRINGTON, *Circuit Judge:*

February 13, 1912, the decree below was reversed and the cause remanded for further proceedings consistent with the opinion then handed down. 193 Fed. 841, 851. So many things have happened in the case since then that we deem it advisable, briefly to allude to them. March 4th, on petition of the Globe Bank and the First National Bank, an appeal was allowed at chambers to the Supreme Court, and bond approved and filed. March 11th, these banks filed a motion for allowance of appeal in open court; and on the next day they filed a motion to vacate the decree of reversal and
119 enter final decree, also a request for separate findings of fact and conclusions of law. March 13th, they filed a petition for rehearing. An order was then made fixing a time for hearing the motions to vacate and modify the decree and to allow appeal in open court, also directing that the mandate be withheld until such motions were disposed of; and the Old State Bank, on the same day, filed a petition for appeal, the allowance of which was postponed. Prior to July 19th, separate findings of fact and conclusions of law were prepared, and on that date the cases were set for hearing at the opening of the October session on questions which then arose as to the proper remedy for reaching the Supreme Court. September 18th, motion to extend record on appeal to petition to revise, was filed by the trustee; and on the day following motions were filed by all the appellee banks to dismiss both the petition to revise and the

appeal. October 7th, the day prior to the expiration of the term, for the purpose of preserving the pending questions of remedy, the appeals theretofore allowed were set aside.

The difficulties that have arisen since the decision in February grow out of the proceedings taken to bring the case as made below into this court and the failure to object to the remedies chosen. The trustee in bankruptcy and certain creditors sought to bring the case here by petition to revise in matter of law (but without transcript of record, which has since been supplied through stipulation), and the trustee alone subsequently resorted to appeal. The petition to revise was filed in this court July 27, 1910, and the transcript on appeal February 23, 1911, and two cases nominally were docketed here. On motion, an order was made postponing the hearing on the petition to revise until the hearing of the appeal; and the cases were, in fact, heard together, in connection with the transcript in the appeal proceeding, as one cause, without objection and without suggestion as to which was the proper remedy. Following the settled course in such circumstances, the court did not consider "any question of remedy or jurisdiction" (193 Fed. at 845, top).

1. Jurisdiction. In the motion to dismiss the petition for revision, the court is asked to determine that question before acting upon any of the other motions. The briefs of counsel are suggestive of another order of disposing of the questions, which we think preferable. Despite the acquiescence of appellees in the remedies adopted and their delay in raising any question of
120 jurisdiction, we feel bound to entertain and determine their motions to dismiss. M., C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 382; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 177; Chi., B. & Q. Ry. Co. v. Willard, 220 U. S. 413, 419. It is urged that the action of the court below was, in effect, a judgment allowing a debt or claim of more than five hundred dollars, and consequently that an appeal should have been taken within ten days after the rendition of such judgment. The final order of the court below was entered July 16, 1910, and the appeal was prayed for and allowed December 3d, upon the execution of a bond with surety "to be approved" by the court, which approval was given January 10, 1911. It follows that if the contention that the action of the court below was a judgment of allowance within the meaning of Section 25*a* of the bankruptcy act, be sound, the motion to dismiss the appeal must be granted, because the limitation to ten days is both distinct and imperative. Conboy v. First Nat. Bk. of Jersey City, 203 U. S. 141, 145; Brady v. Bernard & Kittinger, 170 Fed. 576, 578 (C. C. A. 6th Cir.); In re McCall, 145 Fed. 898, 904 (C. C. A. 6th Cir.); Carriere & Son v. United States, 163 Fed. 1009, 1010; Old Nick Williams Co. v. United States, 215 U. S. 541, 544. However, we do not think that the final order was the allowance of debts or claims. The claims in question are those of the three appellee banks before named. Proofs of the claims of the Globe Bank and the First National Bank were made January 9, 1909, and that of the Old State Bank March 17, 1909. All of these claims were for moneys loaned, and it is distinctly stated in the claim of the

First National Bank and that of the Old State Bank that no security for the debt had in any manner been received. The least of the six promissory notes proved by the Globe Bank, to-wit, a demand note of $500.00, is stated to have been secured by three collateral notes (not involved here) executed by third persons. It is stated in the proof of the Globe Bank that an action (one of the attachment suits mentioned below) was pending in the McCracken Circuit Court on its notes "under which a lien is acquired and held on the real estate therein described, attacking a deed as fraudulent;" but it is further stated that the bank had not "received any manner of security for said debt whatever except three collateral notes," before mentioned. The record filed here being silent as to formal allowance of these claims, a stipulation was filed in the cause October 16, 1912, in which it was agreed that the stipulation should be considered
121 as part of the record in the two cases, and, in substance, that no order appears or was made in the original record,

"allowing or disallowing any of the claims filed by the respondents and appellees, either in respect of their original proofs of claim, or of any of the amended proofs or petitions of said banks, except the order of the referee of date May 23, 1910."

The essential feature of such order of the referee, as well as that of the final order or decree of the court, is that only those creditors, namely, the three appellee banks, whose claims accrued prior to the date of the execution of the voluntary deed of the bankrupt, were entitled to share in the proceeds derived from the sale of the land covered by such deed; the order of the referee stating

"* * * it is adjudged that the creditors of the bankrupt whose debts were created prior to the execution of the deed by the bankrupt, T. J. Atkins, to Ed. L. Atkins and others, and which have been proved and allowed herein, are the only class of creditors entitled to share or participate in the distribution of the funds realized from the sale of the real estate sold under the judgment of the McCracken Circuit Court. * * *"

The amount realized from such sale was stated and was insufficient to pay the debts of these banks; and it was held that they were entitled to the entire fund subject to costs and taxes, and the trustee was ordered to pay same to such banks pro rata upon their respective debts. The theory upon which this conclusion was affirmed in the court below is stated in our original opinion, before cited. It is enough to say now that neither the order of the referee, nor the final decree of the court below, purports to be an allowance of the debt or claim, as such, of any of these three banks. Indeed, the debts as originally proved do not appear ever to have been questioned; and the sums so ordered to be paid on such claims were each materially less than the respective debts proved. The true analysis of the order is that it was an order of distribution. It was an order to distribute a fund derived from the recovery and sale of real estate, the conveyance of which had been made by the bankrupt in fraud of the rights of certain of his creditors, as pointed out in our original decision. This fund was so acquired in pursuance of an order of

the bankruptcy court; and the validity of the order distributing the fund cannot, we think, be rightly tested by any question of allowance of claim within the meaning of Section 25*a*, but rather by the question whether the pertinent provisions of the bankruptcy
122 act, or those of Sections 1906, 1907 and 1907*a* of the Kentucky Statutes (Carroll's Ky. Stat. 1909, pp. 854 to 857), are controlling.

We are not unmindful of the contention that since in May, 1910, these three banks filed amended and supplemental petitions and proofs of their claims, in which they asserted liens upon the property covered by the judgments of the McCracken Circuit Court, the effect of the order of the court below was to allow such amended and supplemental claims. The Globe Bank had before filed pleadings in the bankruptcy proceeding, and had been instrumental in securing the order of the court below, authorizing the trustee to institute proceedings in the McCracken Circuit Court. In the so-called amended and supplemental proofs before alluded to, the judgments obtained in the McCracken Circuit Court are set up and relied on to sustain the security asserted respecting the claims of the banks, and in each of them the court is asked to apply the fund so obtained toward the payment of their respective claims; but these instruments are not in form or substance proofs of claims.

Furthermore, it is not pretended that any of these banks acquired a lien upon this land at the time they made their loans to the bankrupt, or that they ever obtained a lien upon the land until they began their suits in attachment. These suits were confessedly begun within four months of the commencement of the bankruptcy proceeding against the bankrupt; and it is plain that under the sections of the Kentucky Statutes, before cited, the banks, when commencing such suits, had nothing but rights of action respecting the land alleged to have been fraudulently conveyed. The most, then, that can be said of the asserted liens, is that they were acquired within the four months' bankruptcy period. It is hard to perceive how the assertion of such a lien—a lien claimed only to have been created in a case in which the trustee in bankruptcy was a party—can be employed to sustain the theory that the debt (or claim) of any of these banks against the bankrupt was allowed by the order in question of the referee, within the meaning of Section 25*a*. It was not sought to have any balances that might remain due, allowed. As it seems to us, a more rational interpretation of these alleged supplemental proofs is, that they disclose an intent to intervene in the bankruptcy proceeding, for the purpose alone of securing a distribution of the fund solely among the three banks.
123 The question thus arises, whether this is not a controversy arising in a bankruptcy proceeding (Section 24*a*), rather than a bankruptcy proceeding itself (Section 25*a*). It is too plain for argument that the suit begun and conducted by the trustee in the McCracken Circuit Court, under the order of the referee and the authority of the bankruptcy court, involved a controversy arising in a bankruptcy proceeding. The land had been conveyed as a gift by Atkins to his son and grandchildren prior to the com-

mencement of the bankruptcy proceeding against Atkins; and the jurisdiction of the court below to make the February order was dependent upon the fact that the banks commenced their attachment suits within four months of the beginning of the bankruptcy proceeding. The grantees under the deed were in actual possession of the land, and were defendants in the consolidated suit (to set aside the deed) in which the trustee was a plaintiff. If the issues in such a case would not present a controversy arising in bankruptcy proceedings, it is difficult to conceive of what would. The land was converted into money and its equivalent in sale bonds; and on April 2, 1910, the McCracken Circuit Court ordered the trustee, after discharging the costs of the consolidated action, to collect the balance due on the sale bonds and hold same

"subject to the future orders of the District Court of the United States for the Western District of Kentucky in the matter of T. J. Atkins, bankrupt, therein pending in bankruptcy, and as such court may finally determine the rights of all parties under the judgment of this court as hereinbefore rendered; and upon such other matters as may be pending, or may be presented in such proceedings pending in bankruptcy" in such court.

Thus the original subject of the controversy so instituted in the state court was converted into a fund and brought into the custody of the bankruptcy court. Did this change in form of subject-matter, and the extension by the banks of their effort to subject the land so as also to reach its proceeds, operate to convert the original controversy arising in bankruptcy proceedings into a bankruptcy proceeding? We think not. So far as this question is concerned, the case is analogous to Knapp v. Milwaukee Trust Co., 216 U. S. 545, 553. There is no apparent difference in principle between Knapp's intervention in that case to have the lien of the mortgages he represented established as the first lien on the property and satisfied out of the proceeds of sale, and the course pursued here by the three banks to have their asserted rights to the present pro-
124 ceeds of sale established. The purpose of these banks was to have that end accomplished; it was not to have their undisputed debts allowed, and to hold that it was would be to ascribe to the banks an intent that was not revealed until the lapse of six months after the decree of reversal was entered here. Analogy in point of remedy is also found in Hewit v. Berlin Machine Works, 194 U. S. 296, 300. Title was there asserted by petition to certain machines in possession of the trustee in bankruptcy, and this was treated as "an intervention raising a distinct and separable issue," and so was regarded as a controversy arising in bankruptcy proceedings under Section 24*a* (300). True, title to the machinery was there asserted; but we are unable to perceive any distinguishing principle between assertion of title to property in possession of a trustee, and assertion of a right to have property or its proceeds in his possession applied exclusively to debts of particular creditors, like these banks, as against general creditors. Indeed, the insistence of the banks is the practical equivalent, and the ruling below is in effect a recognition, of a claim of title in the banks to the pro-

ceeds of sale; and this at last puts to the test the soundness or not of the decision of this court touching the supremacy of the bankruptcy act over the state statutes respecting the distribution of such proceeds. See, also, Rode & Horn v. Phipps, 195 Fed. 414, 419 (C. C. A. 6th Cir.); In re Mueller, 135 Fed. 711 (C. C. A. 6th Cir.); In re First Nat. Bank, Ibid. 62. As it seems to us, the instant case presents stronger features of a controversy arising in bankruptcy proceedings than are to be found in the cases just commented on and cited. We say this because no lien is asserted that does not fall within the ban of Section 67*f* of the bankruptcy act; and (apart from statutory liens, or transactions based on present consideration, or past consideration without reason to believe the existence of insolvency) no case is cited, and we have not discovered any, which accords to a creditor a priority over his fellow creditors that is not traceable to a title or lien antedating a period of more than four months prior to the commencement of bankruptcy proceedings. This alone, it may be observed, fairly distinguishes the decision in Coder v. Arts, 213 U. S. 223, and its class, from the present case.

The appeal taken in this case was within the six months' period prescribed by Section 11 of the Court of Appeals Act (26 Stat. L. 829), and we are constrained to hold that the case is properly before us. The motion to dismiss the appeal must, therefore, be denied. As regards the motion to dismiss the petition for revision, we must confess that much has been said in support of that remedy. But since this presents the question whether such a remedy is open to the petitioner in a case where appeal is regarded as allowable, we are disposed to adhere to the ruling of this court in Barnes v. Pampel, 192 Fed. 525, in which it was held that the two remedies are mutually exclusive. See, also, Loveland on Bankruptcy (4th ed.), Section 814, and pertinent decisions there cited of the Circuit Courts of Appeals for the 3d, 7th, 8th and 9th Circuits.

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We do not discover that the Supreme Court has passed upon this question; but it has recently decided that an appeal under Section 25, and a petition to revise under Section 24*b*, are not both available in the same case. Matter of Loving, 224 U. S. 183, 188. It cannot escape observation that grave doubts arise in the practice, as also in the courts, as to what one of the appellate remedies should be adopted for reaching courts of appeals; and although counsel for the trustee ask the court to retain the petition to revise until the Supreme Court can pass upon the other questions of remedy, we think we are bound to grant the motion to dismiss that petition; but we do so with the consciousness that any error committed in this respect can be rectified through writ of certiorari.

2. Motion to vacate decree of reversal and enter final decree. The purpose of this motion is simply to avoid the necessity of having the cause remanded only to return here and proceed thence to the Supreme Court. We think the motion should be granted.

3. Rehearing. The petition in this behalf will be denied. We might add that the views expressed in the original opinion respect-

ing Section 67*f* (193 Fed. pp. 846 to 850), derive further support from a consideration of Section 70*a* and *e* of the bankruptcy act; and also Security Warehousing Co. v. Hand, 206 U. S. pp. 425, bottom, and 426, top; Thomas v. Sugarman, 218 U. S. 129, 134. The contention that the judgments of the state court are res judicata respecting the rights of the trustee and creditors, and also the insistence that a resulting trust in the land in dispute accrued in favor of those banks prior to the four months' period, are dependent upon whether, under the bankruptcy act, the judgments of the state courts were, or could be, or were intended by either of the state courts to be, binding upon the trustee or the bankruptcy court concerning the distribution of the sales proceeds. The supremacy
126 of the bankruptcy act, and the intent of the state courts as disclosed by their judgments, are, we think, sufficiently considered in the original opinion to indicate our views touching the claims of res judicata and resulting trusts. Counsel still seem to overlook the fact that their suits in the McCracken Circuit Court were not brought to enforce pre-existing liens, but to create liens. Metcalf v. Barker, 187 U. S. 165, 174.

4. Findings of fact and conclusions of law. We cannot conceive that such findings and conclusions are either necessary or proper in this case. If the case was appealable under Section 25*a*, the trustee's right in that behalf was lost by lapse of time, as before pointed out; and in appeals taken under the Court of Appeals Act a finding of facts or conclusions of law are not required. Knapp v. Milwaukee Trust Co., supra (p. 553).

The remaining questions will be disposed of by entry, which, with orders appropriate to the holdings herein, will be entered.

127 And afterwards towit on December 6, 1912, a petition for appeal and assignments of error *were* filed by the Globe Bank & Trust Company of Paducah, Ky., as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY; FIRST National Bank of Paducah, Kentucky, and Old State National Bank of Evansville, Indiana, Appellees.

Petition for Appeal and Assignment of Errors.

The appellee, Globe Bank & Trust Company, of Paducah, Kentucky, prays an appeal to the Supreme Court of the United States from the final decree entered herein on November 7, 1912, and for a reversal thereof, and respectfully submits that the Court has erred:

1. In reversing the decree of the District Court of the United States for the Western District of Kentucky and remanding the cause to said Court with directions to enter and carry into execution a decree of distribution in accordance with the opinion of this court filed herein February 13, 1912;

128 2. In decreeing and adjudging that the money derived from the sale of the property conveyed by the Bankrupt should pass to his trustee in bankruptcy for distribution ratably among all of the creditors of the said Bankrupt;

3. In adjudging and decreeing that the said District Court erred in affirming the order of the Referee made on May 21, 1910;

4. In adjudging and decreeing that the said District Court erred in affirming said order of the referee in so far as said order directed the said trustee in bankruptcy to pay to this appellee on its debt of $9,837.00 the sum of $6,661.36;

5. In adjudging and decreeing that this appellee, together with the First National Bank of Paducah, Kentucky, and Old State National Bank of Evansville, Indiana, appellees, are not entitled to the entire proceeds derived from the sale of the property conveyed by the bankrupt and sold under the judgment of the McCracken County Kentucky Circuit Court;

6. In adjudging and decreeing that the said District Court erred in affirming the order of the referee made on May 21, 1910, holding that this appellee and said First National Bank of Paducah,

129 Kentucky and Old State National Bank of Evansville, Indiana, are entitled to said entire fund;

7. In refusing to dismiss the appeal herein for want of jurisdiction of this court;

8. In refusing to dismiss the appeal herein because the same was not taken within ten days after the judgment and decree of said District Court was rendered, as required by statute;

9. In denying the motion of this appellee to dismiss the appeal herein;

10. In denying the motion of this appellee for separate findings of fact and conclusions of law.

MAXWELL & RAMSEY,
WHEELER & HUGHES,
Counsel for Globe Bank & Trust Company of Paducah, Kentucky.

The appeal as prayed is allowed and bond fixed at $10,000.00 to operate as a supersedeas if given to my satisfaction on or before December 16, 1912.

J. W. WARRINGTON,
Circuit Judge.

Cincinnati, Ohio, December 6th, 1912.

130 And on the same day to wit December 6, 1912, a petition for appeal and assignments of error by the First National Bank of Paducah, Kentucky, were filed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY; FIRST National Bank of Paducah, Kentucky, and Old State National Bank of Evansville, Indiana, Appellees.

Petition for Appeal and Assignments of Error.

The appellee, First National Bank of Paducah, Kentucky, prays an appeal to the Supreme Court of the United States from the final decree entered herein on November 7, 1912, and for a reversal thereof, and respectfully submits that the court has erred;

1. In reversing the decree of the District Court of the United States for the Western District of Kentucky and remanding the cause to said Court with directions to enter and carry into execution a decree of distribution in accordance with the opinion of this Court filed herein on February 13, 1912;

131 2. In decreeing and adjudging that the money derived from the sale of the property conveyed by the bankrupt should pass to his trustee in bankruptcy for distribution ratably among all the creditors of the said bankrupt.

3. In adjudging and decreeing that the said District Court erred in affirming the order of the referee made on May 21, 1910;

4. In adjudging and decreeing that the said District Court erred in affirming the said order of the referee in so far as said order directed the said trustee in bankruptcy to pay to this appellee on its debt of $6,558.00 the sum of $4,440.88.

5. In adjudging and decreeing that this appellee, together with the Globe Bank & Trust Company of Paducah, Kentucky, and Old State National Bank of Evansville, Indiana, appellees, are not entitled to the entire proceeds derived from the sale of the property conveyed by the bankrupt and sold under the judgment of the McCracken County, Kentucky, Circuit Court;

6. In adjudging and decreeing that the said District Court erred in affirming the order of the referee made on May 21, 1910,

132 holding that this appellee and said Globe Bank & Trust Company of Paducah, Kentucky, and Old State Bank of Evansville, Indiana, are entitled to said entire fund;

7. In refusing to dismiss the appeal herein for want of jurisdiction of this Court;

8. In refusing to dismiss the appeal herein because the same was not taken within ten days after the decree and judgment of said District Court was rendered, as required by statute;

9. In denying the motion of this appellee to dismiss the appeal herein.

10. In denying the motion of this appellee for separate findings of fact and conclusions of law.

MAXWELL & RAMSEY,
WHEELER & HUGHES,
Counsel for First National Bank of Paducah, Kentucky.

The appeal as prayed is allowed and bond fixed at $6,500.00 to operate as a supersedeas if given to my satisfaction on or before December 16, 1912.

J. W. WARRINGTON,
Circuit Judge.

Cincinnati, Ohio, December 6th, 1912.

And on the same day to wit December 6, 1912, a petition for appeal and assignments of error were filed by the Old State
133 National Bank of Evansville, Indiana, in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY; FIRST National Bank of Paducah, Kentucky, and Old State National Bank of Evansville, Indiana, Appellees.

Petition for Appeal and Assignments of Error.

The appellee, Old State National Bank of Evansville, Indiana, prays an appeal to the Supreme Court of the United States from the final decree entered herein on November 7, 1912, and for a reversal thereof and respectfully submits that the court has erred;

1. In reversing the decree of the District Court of the United States for the Western District of Kentucky and remanding the cause to said Court with directions to enter and carry into execution a decree of distribution in accordance with the opinion of this Court filed herein on February 13, 1912;

2. In decreeing and adjudging that the money derived from the sale of the property conveyed by the bankrupt should pass to his trustee in bankruptcy for distribution ratably among all of
134 the creditors of the said bankrupt;

3. In adjudging and decreeing that the said District Court erred in affirming the order of the referee made on May 21, 1910;

4. In adjudging and decreeing that the said District Court erred in affirming said order of the referee in so far as said order directed the said trustee in bankruptcy to pay to this appellee on its debt of $5,493.15 the sum of $3,719.75.

5. In adjudging and decreeing that this appellee together with the First National Bank of Paducah, Kentucky, and Globe Bank & Trust Company of Paducah, Kentucky, appellees, are not entitled to the entire proceeds derived from the sale of the property conveyed by the bankrupt and sold under the judgment of the McCracken County, Kentucky, Circuit Court;

6. In adjudging and decreeing that the said District Court erred in affirming the order of the referee made on May 21, 1910, holding that this appellee and said First National Bank of Paducah, Kentucky, and Globe Bank & Trust Company of Paducah, Kentucky, are entitled to said entire fund.

7. In refusing to dismiss the appeal herein for want of jurisdiction of this court;

135 8. In refusing to dismiss the appeal herein because the same was not taken within ten days after the judgment and decree of said District Court was rendered, as required by statute;

9. In denying the motion of this appellee to dismiss the appeal herein;

10. In denying the motion of this appellee for separate findings of fact and conclusions of law.

MAXWELL & RAMSEY,
WHEELER & HUGHES,
Counsel for Old State National Bank of Evansville, Indiana.

The appeal as prayed is allowed and bond fixed at $5,000.00 to operate as a supersedeas if given to my satisfaction on or before December 16, 1912.

J. W. WARRINGTON,
Circuit Judge.

Cincinnati, Ohio, December 6th, 1912.

And afterwards to wit on December 11, 1912, an appeal bond was filed by the Globe Bank & Trust Company in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

Know all men by these presents, that we, Globe Bank & Trust Company, of Paducah, Kentucky, as principal, and The
136 United States Fidelity & Guaranty Company of Baltimore, Maryland, as sureties, are held and firmly bound unto Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, in the full and just sum of Ten Thousand ($10,000.00) Dollars, to be paid to the said Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, his certain attorneys, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of December, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Sixth Circuit in a suit pending in said court between Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant, and Globe Bank & Trust Company, of Paducah, Kentucky, First National Bank of Paducah, Kentucky, and Old State National Bank of Evansville, Indiana, Appellee, a decree was rendered against the said Globe Bank & Trust Company, of Paducah, Kentucky, and the said Globe Bank & Trust Company, of Paducah, Kentucky, having obtained an appeal and filed
137 a copy thereof in the Clerk's office of the said Court to reverse the said decree in the aforesaid suit, and a citation directed to the said Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Globe Bank & Trust Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

GLOBE BANK & TRUST CO., [SEAL.]
By G. W. ROBERTSON.
GLOBE BANK & TRUST CO., [SEAL.]
By N. W. VAN ALLEN, *Cashier.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By HARRY D. HUPP, *Attorney-in-Fact.*

Sealed and delivered in the presence of
JAMES G. WHEELER,
Witness to Signature of Globe Bank & Trust Co.
NILES R. FLOYD,
JOSEPH W. FARLEY,
As to Surety.

Approved; but it appearing that the fund for distribution in question in the within named cause actually consists of certain purchase money bonds given by the banks praying the present appeal, the supersedeas allowed is not intended in any way to prevent action or proceedings in the court below pending this appeal to enforce collection of the amounts due on such bonds and cause the proceeds to be held either by the trustee or in the registry of the court below according as such court may direct.

J. W. WARRINGTON,
Circuit Judge.

Cincinnati, O., December 11, 1912.

138 And on the same day to wit December 11, 1912, an appeal bond was filed by the First National Bank of Paducah, Kentucky, in the words and figures as follows:

Know all men by these presents, That we, First National Bank of Paducah, Kentucky, as principal, and The United States Fidelity & Guaranty Company of Baltimore, Maryland, as sureties, are held and firmly bound unto Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, in the full and just sum of Six Thousand Five Hundred ($6,500.00) dollars, to be paid to the said Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 11th day of December, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Sixth Circuit, in a suit depending in said court, between Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant, and First National Bank of
139 Paducah, Kentucky, Globe Bank & Trust Company of Paducah, Kentucky, and Old State National Bank of Evansville, Indiana, Appellees, a decree was rendered against the said First National Bank of Paducah, Kentucky, and the said First National Bank of Paducah, Kentucky, having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the said decree in the aforesaid suit, and a citation directed to the said Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said First National Bank of Paducah, Kentucky, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE FIRST NATIONAL BANK OF PADUCAH, KY., [SEAL.]
By ROBT. L. REEVES.
F. A. BAKER, *Cashier.* [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By HARRY B. HUPP, *Attorney-in-Fact.*

Sealed and delivered in the presence of
JAMES G. WHEELER,
Witness to Signature of The First National Bank of Paducah, Ky.
NILES R. FLOYD,
JOSEPH W. FARLEY,
As to Surety.

140 Approved; but it appearing that the fund for distribution in question in the within named cause actually consists of certain purchase money bonds given by the banks praying the present appeal, the supersedeas allowed is not intended in any way to prevent action or proceedings in the court below pending this appeal to enforce collection of the amounts due on such bonds and cause the proceeds to be held either by the trustee or in the registry of the court below according as such court may direct.

J. W. WARRINGTON,
Circuit Judge.

Cincinnati, O., December 11, 1912.

And on the same day to wit December 11, 1912, an appeal bond was filed by the Old State National Bank of Evansville, Indiana, in the words and figures as follows:

Know all men by these presents, that we, Old State National Bank of Evansville, Indiana, as principal, and The United States Fidelity & Guaranty Company of Baltimore, Maryland, as sureties, are held and firmly bound unto Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, in the full and just sum of Five Thousand ($5.000.00) dollars, to be paid to the said
141 Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 11th day of December, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Sixth Circuit in a suit depending in said Court, between Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant, and Old State National Bank of Evansville, Indiana, First National Bank of Paducah, Kentucky, and Globe Bank & Trust Company of Paducah, Kentucky, Appellees, a decree was rendered against the said Old State National Bank of Evansville, Indiana, and the said Old State National Bank of Evansville, Indiana, having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the said decree in the aforesaid suit, and a citation directed to the said Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30
142 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Old State National Bank of Evansville, Indiana, shall prosecute its appeal to effect, and answer all damages and costs if it fail

to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE OLD STATE NATIONAL BANK
OF EVANSVILLE, INDIANA, [SEAL.]
By HENRY REIS, *Pres't*,
By F. R. WILSON, *Cashier.* [SEAL.]
THE UNITED STATES FIDELITY
AND GUARANTY COMPANY. [SEAL.]
By HARRY B. HUPP, *Attorney-in-Fact.*

Sealed and delivered in the presence of
ALEXANDER GILCHRIST,
NILES R. FLOYD,
JOSEPH W. FARLEY,
As to Surety.

Approved; but it appearing that the fund for distribution in the within named cause actually consists of certain purchase money bonds given by the banks praying the present appeal, the supersedeas allowed is not intended in any way to prevent action or proceedings in the court below pending this appeal to enforce collection of the amounts due on such bonds and cause the proceeds to be held either by the trustee or in the registry of the court below according as such court may direct.

J. W. WARRINGTON,
Circuit Judge.

Cincinnat, O., December 11, 1912.

143 And afterwards to wit on December 23rd. 1912, a præcipe for transcript of record on appeal was filed which reads and is as follows

United States Circuit Court of Appeals for the Sixth Circuit.

No. 2160.

ARTHUR Y. MARTIN, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant,
vs.
GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY; FIRST National Bank of Paducah, Kentucky, and Old State National Bank of Evansville, Indiana, Appellees.

Præcipe for Transcript on Appeal.

To Frank O. Loveland, Clerk United States Circuit Court of Appeals, Sixth Circuit:

Please prepare a transcript of record on appeal by including the following papers only in the transcript of record, to be certified to the Supreme Court of the United States, to wit:

1. Printed record of the District Court including the supplemental record.

2. Order of the Circuit Court of Appeals reversing decree of District Court, entered February 13, 1912.

3. Opinion of Circuit Court of Appeals (Warrington, C. J.) filed February 13, 1912.

4. Motion to vacate, modify and extend decree and opinion
144 rendered on February 13, 1912, filed by Globe Bank & Trust Company of Paducah, Kentucky, and First National Bank of Paducah, Kentucky, on March 12, 1912.

5. Journal entry of March 12, 1912, "Motion to modify decree, etc., submitted."

6. Order setting motions for hearing on April 2, 1912, and staying mandate until that time, entered March 13, 1912.

7. Journal entry of April 2, 1912, "Motions argued and submitted."

8. Order setting cause for hearing on the question of remedy at the October Session, entered July 19, 1912.

9. Motion to dismiss appeal, filed by appellees, on September 19, 1912.

10. Order setting aside appeals, entered October 7, 1912.

11. Journal entry of October 9, 1912, "Cause argued in part on question of remedy."

12. Journal entry of October 10, 1912, "Cause further argued and submitted."

13. Stipulation as to proofs of claim filed October 16, 1912.

14. Order denying motion to dismiss appeal and final decree, entered November 7, 1912.

145 15. Opinion of the Circuit Court of Appeals (Warrington, C. J.) filed November 7, 1912.

16. Petition for appeal and assignment of errors of Globe Bank and Trust Company of Paducah, Kentucky, filed and allowed on December 6, 1912.

17. Petition for appeal and assignment of errors of First National Bank of Paducah, Kentucky, filed and allowed on December 6, 1912.

18. Petition for appeal and assignment of errors of Old State National Bank of Evansville, Indiana, filed and allowed on December 6, 1912.

19. Bond of Globe Bank and Trust Company of Paducah, Kentucky, filed and approved on December 11, 1912.

20. Bond of First National Bank of Paducah, Kentucky, filed and approved on December 11, 1912.

21. Bond of Old State National Bank of Evansville, Indiana, filed and approved on December 11, 1912.

MAXWELL & RAMSEY,
WHEELER & HUGHES,
Attorneys for Appellees.

146 UNITED STATES OF AMERICA, *ss:*

To Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit wherein Globe Bank and Trust Company, of Paducah, Kentucky, is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John W. Warrington, Judge of the United States Circuit Court of Appeals for the Sixth Circuit, this eleventh day of December, in the year of our Lord one thousand nine hundred and twelve.

J. W. WARRINGTON,
Judge United States Circuit Court of Appeals
for the Sixth Circuit.

Service of this citation acknowledged December 19", 1912.
W. F. BRADSHAW, JR.,
Att'y for Martin, &c., Trustee.
ARTHUR Y. MARTIN, *Trustee.*

147 UNITED STATES OF AMERICA, *ss:*

To Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit wherein First National Bank of Paducah, Kentucky, is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John W. Warrington, Judge of the United States Circuit Court of Appeals for the Sixth Circuit, this eleventh day of December, in the year of our Lord one thousand nine hundred and twelve.

J. W. WARRINGTON,
Judge United States Circuit Court of Appeals
for the Sixth Circuit.

Service of this citation acknowledged December 19", 1912.
W. F. BRADSHAW, JR.,
Att'y for Martin, &c., Trustee.
ARTHUR Y. MARTIN, *Trustee.*

148 UNITED STATES OF AMERICA, *ss:*

To Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein Old State National Bank of Evansville, Indiana, is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John W. Warrington, Judge of the United States Circuit —— of Appeals for the Sixth Circuit, this eleventh day of December, in the year of our Lord one thousand nine hundred and twelve.

J. W. WARRINGTON,
Judge United States Circuit Court of Appeals
for the Sixth Circuit.

Service of this citation acknowledged December 19", 1912.

W. F. BRADSHAW, JR.,
Att'y for Martin, &c., Trustee.
ARTHUR Y. MARTIN, *Trustee.*

149 UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify the above and foregoing to be a full true and correct transcript of the record in the case of Arthur Y. Martin, Trustee in Bankruptcy of Thomas Jeremiah Atkins, Bankrupt, Appellant, vs. Globe Bank & Trust Co. of Paducah, Ky., First National Bank of Paducah, Ky., and Old State National Bank of Evansville, Ind., Appellees, as required by the præcipe of counsel for the parties removing the case to the Supreme Court, filed in said case, and the original citations.

In Testimony Whereof I have hereunto set my hand and the seal of said Court at my office in the city of Cincinnati, Ohio, this 3rd day of January, 1913.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals
for the Sixth Circuit.

Endorsed on cover: File No. 23,507. U. S. Circuit Court Appeals, 6th Circuit. Term No. 430. Globe Bank & Trust Company of Paducah, Kentucky, appellant, vs. Arthur Y. Martin, trustee in bankruptcy of Thomas Jeremiah Atkins, bankrupt. File No. 23,508. Term No. 431. First National Bank of Paducah, Kentucky, appellant, vs. Arthur Y. Martin, trustee in bankruptcy of Thomas Jeremiah Atkins, bankrupt. File No. 23,509. Term No. 432. Old State National Bank of Evansville, Indiana, appellant, vs. Arthur Y. Martin, trustee in bankruptcy of Thomas Jeremiah Atkins, bankrupt. Filed January 17th, 1913. File Nos. 23,507, 23,508, & 23,509.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 99.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE, ETC.

No. 100.

FIRST NATIONAL BANK OF PADUCAH, KENTUCKY, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE, ETC.

No. 101.

OLD STATE NATIONAL BANK OF EVANSVILLE, INDIANA, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE, ETC.

BRIEF FOR THE APPELLANTS.

ALEXANDER GILCHRIST,
Counsel for Appellants.

C. K. WHEELER,
D. H. HUGHES,
J. G. WHEELER,
Of Counsel.

INDEX.

CITATIONS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 99.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, APPELLEE.

No. 100.

FIRST NATIONAL BANK OF PADUCAH, KENTUCKY, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, APPELLEE.

No. 101.

OLD STATE NATIONAL BANK OF EVANSVILLE, INDIANA, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, APPELLEE.

BRIEF FOR THE APPELLANTS IN EACH OF THE FOREGOING CAUSES.

Statement.

Thomas Jeremiah Atkins, being, at the time, a resident of Paducah, in the State of Kentucky, on the 3d day of December, 1906, conveyed, without valuable consideration

therefor, to his son, Ed. L. Atkins, and the children of his said son, several valuable parcels of real estate, situated in the city of Paducah, Kentucky, reserving to himself, however, an interest therein for the remainder of his life.

At the time this conveyance was made the said grantor was indebted to the Globe Bank & Trust Company of Paducah, Kentucky, to the First National Bank of Paducah, Kentucky, and to the Old State National Bank of Evansville, Indiana, in large sums, aggregating more than twenty thousand ($20,000) dollars.

Some time after the said conveyance was made the said Thomas Jeremiah Atkins became indebted to various other parties, including the Bank of Murray, Kentucky, the Citizens Bank of Murray, Kentucky, and Citizens Savings Bank of Paducah, Kentucky, in various sums.

On August 25, 1908, the said Globe Bank & Trust Company of Paducah, Kentucky, instituted its suit in the Circuit Court of McCracken County, Kentucky, seeking to subject the several parcels of real estate conveyed, as aforesaid, by Thomas Jeremiah Atkins to his son and grandchildren, without valuable consideration, basing its right of action upon section 1907 of the Kentucky Statutes, which provides as follows:

> "*Gifts, Conveyances, and Transfers Without Consideration.*—Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers."

Said Globe Bank & Trust Company had issued an attachment in said proceeding, which was levied upon the real

estate referred to, the title to which then stood in the name of Ed. L. Atkins and his children, subject, however, to the life estate of the grantor.

The First National Bank of Paducah, Kentucky, and the Old State National Bank of Evansville, Indiana, each filed suits, seeking to subject said real estate to their debts, respectively, because the attempted alienation thereof, without valuable consideration, was void as to them, the grantor being in debt to them at the time the conveyance was made.

The record shows that both the First National Bank of Paducah, Kentucky, and the Old State National Bank of Evansville, Indiana, had issued attachments, which were levied upon said real estate, although the fact is that neither of them had attachments issued, and the entry of the judgments showing such attachments was improvidently done, as appears in the office of the clerk of the McCracken Circuit Court of Kentucky; but we think that is not a material fact, as will hereafter appear.

Within four months after said suits were filed by the said banks and the trust company a petition in bankruptcy was filed against Thomas Jeremiah Atkins, and on December 28, 1908, he was adjudicated a bankrupt.

The Globe Bank & Trust Company, by petition to the bankruptcy court, had its attachment, obtained through its State court proceeding, preserved under section 67*f* of the bankruptcy act, and also had the trustee in bankruptcy of Thomas Jeremiah Atkins authorized to become a party to the suits in the State court, which then had been consolidated, of the three banks above referred to.

The said trustee, Arthur Y. Martin, instituted his action in the McCracken Circuit Court, praying that said conveyance by Thomas Jeremiah Atkins, as above mentioned, be set aside as fraudulent and void as to all creditors, both those whose debts were created before the conveyance referred to and those whose debts were created after the conveyance, relying upon section 1907 of the Kentucky Statutes to support his claim, and attempting therein to show that

the said conveyance was "actually fraudulent," and furth asserting his right, as trustee in bankruptcy, to be substituted as the real party in interest in the suits then pending in the State court and above referred to, and that whatever be recovered in said suits should be for the benefit of all the creditors of said Thomas Jeremiah Atkins.

This suit of the trustee was consolidated in the State court with the other suits referred to, and they were all heard as one in that court, which rendered a judgment, in substance, "that the said conveyance was, under section 1907 of the Kentucky Statutes, fraudulent only as to those creditors of Thomas Jeremiah Atkins whose debts were created prior to the execution and delivery of the deed aforesaid," but further held that there was no actual fraud on the part of said Thomas Jeremiah Atkins in executing said deed, and therefore said deed was not void as to creditors whose debts were created after the execution and delivery and filing for record of said deed.

The court further, in the decree rendered upon its said judgment, directed that enough only of said real estate to satisfy the debts of the Globe Bank & Trust Company, the First National Bank of Paducah, Kentucky, and the Old State National Bank of Evansville, Indiana, should be sold, as their debts were the only ones shown to have been created before the conveyance referred to above, and further adjudged that if it should not be necessity to sell all of said property to satisfy said debts, then the balance thereof should belong to the grantees in said deed; the life estate of said Thomas Jeremiah Atkins had, in the meantime, terminated by reason of his death.

The State court then appointed Arthur Y. Martin, who was at the time trustee in bankruptcy of Thomas Jeremiah Atkins, to act as its special commissioner to execute its judgment and sell enough only of said real estate to satisfy the debts of Thomas Jeremiah Atkins, created before the said conveyance was made, and to collect the proceeds of the sale

and hold same subject to the final orders of the court, or subject to the orders of the bankruptcy court.

Feeling aggrieved the said trustee in bankruptcy appealed from said judgment of the McCracken Circuit Court of Kentucky to the Court of Appeals of Kentucky, where the judgment of the lower court, holding that the conveyance by Thomas Jeremiah Atkins was not actually fraudulent, and therefore not void as to debts created after the conveyance, but was constructively fraudulent and void as to debts created before the conveyance, was affirmed; the said Court of Appeals of Kentucky holding that if the said property, when sold, should bring more than enough to pay said antecedent debts, then such overplus should be paid to the grantees in said deeds, whose rights thereunder were superior to all others, except the holders of such antecedent debts. We quote from the opinion of the Court of Appeals as follows:

> "Only those creditors whose debts were created previous to December 4th, 1906, are entitled to participate in the proceeds realized from the sale of said property. If the proceeds amount to more than sufficient to pay such debts, the surplus should be paid to the grantees in the deed."

This decision of the Court of Appeals stands unreversed and not modified, and that decision holds that it is proper that the proceeds of the property sold under the judgment (that is, enough thereof to pay the debts antedating the conveyance) should be paid over to the trustee in bankruptcy, to be administered as a part of the estate of the bankrupt, in the bankruptcy court. The judgment of the McCracken Circuit Court, as affirmed by the Court of Appeals of Kentucky, was then executed by the special commissioner, who was also the trustee in bankruptcy of Thomas Jeremiah Atkins. The property sold did not bring enough to pay the debts created before the said deed was made.

The special commissioner made his report to the McCracken Circuit Court of Kentucky, and in due course the

property so sold was conveyed to the purchasers. The special commissioner, who was the trustee in bankruptcy, reported to the referee in bankruptcy what had been done in the State court and asked for directions.

In the meantime the Globe Bank and Trust Company, the First National Bank of Paducah, Kentucky, and the Old State National Bank of Evansville, Indiana, had filed their claims, properly proven and certified, in the bankruptcy proceeding, claiming, as an incident thereto, that the proceeds of the sale of the real estate referred to above, not being enough to satisfy said debts, should be paid to them *pro rata*. The referee directed the trustee to pay to the three claimants the proceeds of the sale of said property. Thereupon the trustee in bankruptcy and several creditors whose debts were created after the said conveyance complained of the direction of the referee and asked the District Court of the United States for the Western District of Kentucky to review the matters, and upon a hearing thereof the said district court sustained the referee, delivering an opinion in writing, to be found on pages 51 and 52 of the printed record in these proceedings, and thereupon the petition for review was dismissed on the 16th day of July, 1910.

On December 3, 1910, the trustee in bankruptcy filed his petition for an appeal and assignment of errors, and thereupon an appeal was allowed to the Circuit Court of Appeals for the Sixth Circuit from the judgment of the district court of July 16, 1910. (See printed record, page 52.)

The claim of the trustee and certain creditors of the bankrupt is that, under section 67*f* of the bankruptcy act of 1898 all of the creditors of the bankrupt are entitled to participate in the fund realized from the sale of certain real estate, while the highest court of the State of Kentucky, in an opinion not appealed from nor modified, held that only the certain creditors named in that opinion had any interest whatever in said real estate or the proceeds thereof as against the grantees in the deed above referred to, said trustee and creditors joining him making such claim because, as they set

up in their pleading, the suits to secure their rights under the Kentucky statutes were not brought by said antecedent creditors until within four months of the time the petition in bankruptcy was filed.

These causes went to the Circuit Court of Appeals for the Sixth Circuit, both upon appeal and by petition for review, and in that court it was held that all of the creditors of the bankrupt should participate in the fund in question, because, in the opinion of that court, the rights of the three antecedent creditors were acquired by attachments within four months before the bankruptcy petition was filed.

It will be noticed, as above stated, that the trustee undertook to have the Circuit Court of Appeals hear the matter in dispute by appeal and by petition for review, and the court considered both together, but it does not appear whether the court's order is upon the petition for review or upon the appeal.

And right here, "lest we forget," it is important to remember that it is well settled that "these remedies are exclusive of each other."

In re Mueller, 135 Federal, 711.

The creditors, whose debts were created before the conveyance, believing that when they filed their claims before the referee, claiming their exclusive right to the proceeds of the sale of said real estate, as fixed by the Court of Appeals of Kentucky, then instituted "a proceeding in bankruptcy" as distinguished from "a controversy arising in a bankruptcy proceeding," and that the trustee in bankruptcy was not entitled to a review in the Circuit Court of Appeals by petition under section 24*b* of the bankruptcy act, but was limited to an appeal under section 25*a*, entered motions in the Circuit Court of Appeals to dismiss the petition for review, and also entered motions to dismiss the appeal, because it was not taken within ten days after the judgment was entered in the district court, relying upon the case of *In re* Loving, Trustee, decided by this court and reported in 224 U. S.,

page 183; *In re* Mueller, 135 Federal, 711, and Conder *vs.* Arts, 213 U. S., 223, as authorities to support their position.

The motions to dismiss were denied, and the order and decree of February 13, 1912, was entered. (See printed record, page 72, and the opinion of the court following.)

From that judgment of the Circuit Court of Appeals these appeals were allowed, and it is because of that judgment that the appellants here, the only creditors of the bankrupt whose debts were created prior to the conveyance referred to, are complaining.

SPECIFICATION OF ERRORS RELIED UPON.

I.

Error of the Circuit Court of Appeals in refusing to dismiss appeal and petition for review.

Authorities relied upon:

In re Mueller, 135 Federal, 711.

In re Loving, 224 U. S., 183.

Conder *vs.* Arts, 213 U. S., 213.

Bankruptcy act, 1898, sections 25*a* and 25*b*.

II.

Error of Circuit Court of Appeals in holding that recovery of property under Kentucky statutes, section 1907 (Carroll's Kentucky Statutes, edition 1909), is for benefit of creditors whose debts were created after voluntary conveyance, as well as those whose debts were created before such conveyance, although no actual fraud shown.

Authorities relied upon:

Kentucky Statutes, section 1907 (Carroll's edition of 1909).

Atkins' Trustee *et al. vs.* Globe Bank & Trust Co., 124 S. W., 879.

Bankruptcy act, 1898, section 64*b* (5).
Bankruptcy act, 1898, section 67*f*.
Bankruptcy act, 1898, section 70 (4).
In re Bennett, 153 Federal, 673.
In re Allen (D. C.), 96 Federal, 512.
Merchants Bank *vs.* Sexton, 228 U. S., 634.
In re Laird, 109 Federal, 550.
First National Bank *vs.* Staake, 202 U. S., 141.
Miller *vs.* New Orleans Fertilizer Co., 211 U. S., 496.

ARGUMENT.

The Circuit Court of Appeals erred in denying the motion to dismiss the petition for review because these matters in question are claims asserted against the bankrupt's estate, not only for the amount thereof, but for a lien therefor upon certain property that the bankrupt had attempted to, but could not, alienate, so far as the appellants are concerned, but which he had alienated so far as the rights of any other creditors are concerned, and are therefore necessarily "bankruptcy proceedings," and the judgments of the district court thereon are appealable to the Circuit Court of Appeals under section 25*a*, and are not subject to review by petition, "as a controversy arising in bankruptcy proceedings," and the trustee, being entitled, under section 25*a*, to an appeal to the Circuit Court of Appeals, is not also entitled to a review in the Circuit Court of Appeals by petition under section 24*b*.

In re Loving, Trustee, 224 U. S., 183.
In re Mueller, 135 Federal, 711.
Conder *vs.* Arts, 213 U. S., 213.

The matters under consideration being "bankruptcy proceedings," and the judgment of the district court thereon being appealable to the Circuit Court of Appeals, under section 25*a*, the appeal should have been taken within ten days

after the judgment appealed from was rendered. The appeal was not taken until more than five months after the judgment was rendered.

We submit that the judgment of the Circuit Court of Appeals should be reversed and the appeal and petition for review should both be ordered to be dismissed.

If our position in insisting that the Circuit Court of Appeals should have dismissed both the appeal from the order of the district court and the petition for review of the order of the district court is not tenable, then we ask leave to submit the following suggestions:

The Circuit Court of Appeals reversed the order of the district court upon the idea that the rights of and priorities claimed by appellants were acquired by attachments issued in suits filed within four months before the bankruptcy proceedings against the bankrupt and levied upon the property involved, and that the rights and liens thus acquired enured to the benefit of all creditors, under section 67*f* of the bankruptcy act, a wholly erroneous idea, because appellants do not rest their cases nor base their rights to the proceeds of the property involved upon any such claims. It is true that suits were instituted by the appellants against Thomas Jeremiah Atkins and the grantees named in the deed referred to in the record in the McCracken Circuit Court of Kentucky, seeking to have the deed declared void as to them, because of the provisions of section 1907 of the Kentucky statutes, and the record shows that attachments were issued and levied upon the property involved. It is likewise true that this was done within four months before the bankruptcy proceedings were begun. But it must be understood that appellants do not claim any right of priority because of the suits nor because of the attachments, but they base their claims to the proceeds of the property, to the exclusion of the claims of other creditors, upon the fact that their debtor conveyed said property, without valuable consideration, after his obligations to them were created, but long before any of the other debts came into existence, and such conveyance was,

under the provisions of the law of Kentucky, void as to them, but not void as to the debts created after the deed was executed and recorded.

For the convenience of the court we quote again the law of Kentucky referred to, as follows:

> "SECTION 1907. Gifts, conveyances and transfers without consideration. Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers without notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers."

There can be but one construction of this law, and that is that, in the absence of actual fraud, only those creditors whose debts existed at the time of the conveyance, have any claim upon or right in or to the property conveyed without valuable consideration.

In the case under consideration it appears that in the litigation in the courts of the State of Kentucky the creditors claiming priority of right to the property involved and its proceeds because of the fact that their debts were the only ones created before the conveyance, the creditors whose debts were created after the conveyance, the trustee in bankruptcy, the bankrupt, and the grantees in the deed were all parties and were before the court by petition, service of process, or otherwise, and that in that litigation the issues were sharply drawn, and therein it was declared to be the law of the State of Kentucky that the creditors of Thomas Jeremiah Atkins, to whom he had become indebted before the conveyance of said property to the grantees named in the deed, alone were entitled to have their debts paid from the proceeds of the property so conveyed; that the creditors to whom

he became indebted after the date of such conveyance could have no interest in the property or its proceeds, because there was no actual fraud on the part of the grantor in making said conveyance, and that if the property should sell for more than the aggregate of the debts first mentioned the surplus should be paid to the grantees in the deed.

Thus it is the law of Kentucky, both by statute and by judicial determination, that the appellants, of all of the creditors of Thomas Jeremiah Atkins, are alone entitled to have their debts paid from the proceeds of the sale of the property which was conveyed by said Atkins without valuable consideration.

Assuming that, under section 67*f* of the bankruptcy act, the property or its proceeds must come to the trustee to be preserved by him for the benefit of the estate, as it did in this case, then comes the question of distribution, and debts which have priority must be paid in respect to such priority. The Congress of the United States has determined, in the exercise of its right so to do, what debts shall have priority by the enactment of section 64 and the several sub-sections thereof as a part of the bankruptcy law.

Section 64*b*, sub-section 5, declares that:

> "Debts owing to any person who, by the laws of the States, or the United States, are entitled to priority, shall have priority and be paid in full before any general debts are paid, or dividends declared."

We do not contend that a State law can of its own force determine priorities under a national bankruptcy law, but it is another thing when the national bankruptcy law prescribes that effect shall be given to State laws which do give priority to certain debts.

Congress, in enacting the bankruptcy law, has elected to prescribe as one rule of distribution that debts entitled to priority under any State law shall be accorded a like priority in the distribution of the bankrupt's estate, and that part of the bankrupt act is just as effective and just as forceful as section 67*f*.

We refer with pleasure and with great respect to the decision of the Circuit Court of Appeals, written by Judge Lurton, which appears in 153 Federal Reporter, at page 673 and several pages following, in the case entitled "*In re* Bennett," in support of the position just stated, and from which opinion we have obtained the ideas above expressed, and, to a great extent, the words used. And, as further stated in that opinion:

> "The law which we administer is thus the national bankrupt law; that is, the preference in bankruptcy thus accorded, is a preference prescribed by the bankrupt law, which, for this purpose, adopts the law of the State as the applicable Federal law. This is the view which has been taken by many careful judges and accords with our own view."

If the only claim to the right to a preference in this case grew out of a lien secured by attachment proceedings, as in the case of *In re* Allen (D. C.), 96 Federal, 512, then a very different case would be presented; but no right was acquired nor is any claimed by reason of the attachments, which were wholly unnecessary, but at the time they were issued seemed to be considered useful for the purpose of preserving the property involved. The appellant's claims to preference in the distribution of the proceeds of the sale of the property which was recovered from the grantees in the deed referred to under the judgment of the courts of the State of Kentucky are based solely upon their right to recover said property which accrued when the conveyance, without valuable consideration, was executed and filed for record; there arose at that moment and existed from that time "a right to an ultimate application of that particular property to the payment of the debts of Thomas Jeremiah Atkins which were contracted before the conveyance—a right so tangible and specific as that it cannot be defeated by alienation, mortgage, or other encumbrance, nor by any process of law, receivership, assignment or insolvency proceedings; a right that fastens itself so strongly that it adheres even after the death

of the personal debtor, and it is impossible to draw any very solid distinction between the equitable consequences of such a right and those of a full technical lien." (Quoted from *In re* Bennett, 153 Federal, 673.)

Of course, the right of the appellants to subject the property to their debts could not ripen into an actuality until a judgment of a court of competent jurisdiction could be obtained (unless the grantees in the deed should voluntarily surrender the property to them for sale and application of the proceeds to their debts). But still the right existed in them, and in them alone, to subject the property, and the exercise of that long pre-existing right within four months before the institution of the bankruptcy proceedings against the personal debtor certainly cannot deprive appellants of their exclusive right to the proceeds of the property as against subsequent creditors—a right firmly fixed by the statute of the State of Kentucky and by judicial determination of the courts of that State.

This situation may be well likened unto one wherein a lien by contract had been given more than four months before the proceedings and foreclosure proceedings thereunder instituted within four months before bankruptcy, with an attachment issued and levied upon property covered by the lien for the purpose of protecting and preserving the property. Can it be said that because of the suit and attachment begun and levied within four months of the bankruptcy the right that existed long before that time must be surrendered and the property subjected to the claims of all creditors alike? Can a contract right be considered more sacred than one fixed by statute and judicial determination? And likewise it may be likened unto the situation presented in the case of *In re* Bennett, *supra*, where "an inchoate right or incipient lien" originated with the furnishing of the materials, and existed from that time, and which became a ripened lien and fixed charge when the event happened, which is named in the statute. The right in such a case, as "*In re* Bennett," is because of the furnishing of the materials, and attaches

immediately when the materials are furnished. So the right to preference in our cases attached when the conveyance was made, and is in no wise dependent upon the time when the action to enforce this right was begun.

The opinion of Judge Lurton, later Mr. Justice Lurton, in the case of "*In re* Bennett," is so comprehensive, and so clearly and definitely prescribes what effect shall be given to State laws which give priority to certain debts, under the provisions of the bankruptcy law, that we feel justified in citing that opinion in full support of our position in these cases. It is not a question as to whether the bankruptcy law is a law superior, within its field, to a State law in the same field, but it is a question whether a priority given by State statute and by judicial interpretation thereof, and the determination of the rights of the parties by the courts of that State, is preserved by the bankrupt law. This is answered by section 64*b* (5) of the bankrupt act.

If the proceeds of the property involved became a part of the bankrupt's general estate, then, in the distribution of the general estate, appellants are entitled to preference, because the law of the State of Kentucky is that they are to be preferred in the distribution of that particular fund, and section 64*b* (5) of the bankruptcy act provides that the "debts owing to any person, who, by the laws of the States, or of the United States, is entitled to priority," shall be preferred in the distribution of the estate.

On the other hand, if the proceeds of the sale of said property did not become a part of the general estate, but came into the hands of the trustee, as a fund, "specially applicable" to the payment of the claims of the creditors of the bankrupt whose debts antedated the conveyance, as fixed by the law of Kentucky, a situation appears somewhat similar to that presented in the case of Merchants Bank *vs.* Sexton, 228 U. S., 634-645, where such a thing as two estates, or two funds, coming into one bankruptcy proceeding, a special estate or fund applicable to the payment of certain debts, and to them alone, and a general estate or

fund applicable to the general claims against the bankrupt, is recognized, then surely, under the law of the State of Kentucky, and under the provisions of the bankrupt law, preserving preference existing under the State law, no creditor of Thomas Jeremiah Atkins can have any interest or right to any part of the proceeds of the sale of the property involved in this litigation, except the appellants, to whom the Kentucky courts have decreed the proceeds of said property, to the extent of their claims, and if there had been a balance, after paying their claims, such balance would have been paid to the grantees in the deed.

It is wholly unnecessary for us to call the court's attention to the distinction between the many cases referred to in the case of "*In re* Bennett," and the principle determined by the opinion in that case, because the learned judge who wrote the opinion most exhaustively therein distinguished between the several cases and the one the court had in hand at that time, citing extensively from an opinion delivered by Judge Day in the case of *In re* Laird, 109 Federal, 550.

The effect of bankruptcy is to so fix the relative rights of the different classes of creditors, that it is not in the power of any class to set aside or frustrate as against the other, rights fixed by the adjudication in the assets of the estate, and it is the duty of the trustee to conserve and administer such rights.

Merchants Bank *vs.* Sexton, 228 U. S., 634.

The rights of the appellants, exclusively, to the proceeds of the property involved, became fixed when the deed was made, and remained in that condition up to and after the adjudication, and it is not in the power of creditors whose debts were created after the deed was made to frustrate or set aside the rights of appellants so fixed, but it was and is the duty of the trustee to conserve and administer the rights of the appellants.

The facts in the case of First National Bank *vs.* Staake, referred to in the opinion of the Circuit Court of Appeals,

as appears on page 79 of the printed record, are so entirely different from the facts in the case under consideration that it is not authority in this case. In the Staake case, the rights of the creditors, claiming preference, were based solely upon attachments which were levied upon the property involved, within four months of the adjudication in bankruptcy; the creditors claiming preference had no special right nor claim whatever upon the property, except that acquired by the attachments, there was no judicial determination by the courts of a State in a proceeding to which all of the parties interested were parties, determining that a certain class of creditors had rights superior to that of the other creditors, and the opinion in that case determines that where the sole rights of creditors claiming preference is based upon attachments levied upon property within four months of the adjudication in bankruptcy, there is no preference under the bankrupt act. The effect of section 64*b* (5) of the bankrupt act is not considered in that case at all, because it was not applicable. So, in each of the other cases cited in the opinion of the Circuit Court of Appeals in support of the position thereby assumed, the facts are different from the instant case, and in no one of them, so far as we are able to discover, does it appear that after a State court of competent jurisdiction has determined rights and priorities as between the trustee in bankruptcy and certain classes of creditors, a bankrupt court will undertake to ignore priorities fixed by the State court, because that would be against the express provisions of the bankrupt act itself, and the judicial interpretations thereof.

The decisions of the courts of Kentucky, fixing the rights of appellants as superior to those of other creditors, are based, not upon any lien or right acquired by attachment, but altogether upon the fact that the conveyance by Thomas Jeremiah Atkins was void absolutely as to the debts he then owed, but was not void as to debts thereafter created; so far as the bankrupt was concerned, nothing was necessary to

be done by appellants to fix their rights to subject the property; but to enforce that right, just as to enforce a contract right, an action was necessary, and the institution of such an action within four months of the bankruptcy proceedings—even with an attachment to protect and preserve the property—will not lose to the appellants their right of preference which arose the moment the conveyance was made, any more than an action brought by a contract lienholder within four months to enforce his lien, created more than four months before the bankruptcy, would lose to him his rights as against general creditors to the property under lien; although the trustee in bankruptcy might have the right to administer the fund arising from the enforcement of the lien, he must follow the requirements of the bankrupt act, and pay the money out according to contract or statutory priorities.

We admit that the bankruptcy law is paramount in the field which the Congress has covered in enacting that law; that the jurisdiction of the bankruptcy court, as regards matters rightfully brought therein, is exclusive. The statement in the opinion of the Circuit Court of Appeals that appellants commenced their actions, authorized by Kentucky Statutes, section 1907, within four months of the filing of the petition in bankruptcy against Atkins is sustained by the facts; but we question the correctness of that court's conclusion that appellants had no claims upon the property involved, except such as were obtained within four months of or during the pendency of the bankruptcy proceeding; and we challenge the statement in that opinion that "the most that can be said of Atkins' delivery of the deed of gift is that it created in each of the banks a right of action" (page 78, printed Record).

The delivery of the deed created, *eo instante*, a right in appellants alone upon the property, as well as the right to enforce it by action.

The case of Miller *vs.* New Orleans Fertilizer Company, 11 U. S., 496, so liberally quoted from by Judge Warring-

ton in delivering the opinion of the Circuit Court of Appeals in these cases, presents a proposition, it seems to us, entirely different from the question here involved. A difference existed between the law of Louisiana and the bankruptcy act touching the distribution of assets belonging to individual members of a Louisiana partnership; the bankruptcy act providing how distribution of such assets shall be made is, of course, controlling. As stated in that case:

> "The controlling provisions following (referring to subdivisions of section 5 of the bankruptcy act) are the direct antithesis of the rule prevailing in the State of Louisiana."

But in the case being considered there is no such difference or conflict between the disposition of the property involved, as fixed by the law of Kentucky and the bankruptcy act, that act, section 64*b* (5), in terms protecting priorities fixed by the laws of the States. Congress had the right to have enacted otherwise than it did by section 64*b* (5)—just as much right as it had to provide, as it did in section 5 of the bankruptcy act and subdivisions thereof, as to how the assets of partnership estates should be distributed; but Congress saw fit, by the enactment of section 64*b* (5), to preserve priorities fixed by the laws of the State and of the United States, and, having done so, there is no authority for overriding the law of the State of Kentucky, as fixed by the statute of that State and by the determination of the Court of Appeals of Kentucky in the case of Atkins, trustee, *et al.*, appellants, *vs.* Globe Bank & Trust Company and others, appellees, reported in 124 Southwestern, page 879. This case does not appear in the Kentucky State Reports, as it appears to have been marked "not to be officially reported," but the decision is published in full in 124 Southwestern, pages 879-882, inclusive.

It will be argued by our adversaries that the Kentucky courts did not determine how the proceeds of the property involved should be distributed, because of the following lan-

guage, appearing in the opinion of the Kentucky Court of Appeals:

> "We do not doubt that, when the (lower) court comes to make an order concerning the disposition of the proceeds in the hands of the trustee, as special commissioner, it will direct that the proceeds be paid over to the trustee in bankruptcy, to be administered as a part of the estate of the bankrupt in the bankruptcy court."

We do not question the right of the trustee to administer the fund derived from the sale of the property; he represents the creditors having prior rights, as well as those having inferior rights; it is his duty to administer "special funds" and to pay them to creditors having prior rights thereto, as well as it is his duty to administer the general estate and distribute it generally among creditors having no prior rights thereto. Property of the bankrupt, under mortgage or other contract lien, comes to the trustee, subject, however, to the lien thereof, and the proceeds thereof must be paid over to the trustee, but not to the prejudice of the lienholder, because, in making distribution, the trustee must, under the provisions of the bankrupt law, recognize that "debts owing to any person, who, by the laws of the State or of the United States, is entitled to priority, must be given that priority."

The trustee of the estate of the bankrupt shall be vested, by operation of law, with the title of the bankrupt to property transferred by the bankrupt in fraud of his creditors. Bankruptcy act, section 70 (4). But he holds such title, as trustee, only for such creditors as are prejudiced by the fraud; only for such creditors as can, under the law establishing the fraud, subject the property so conveyed.

It would be a strange interpretation of the decision of the Kentucky court to say that it held that none of the creditors of Atkins, whose debts were created after the voluntary conveyance, can have any interest in the proceeds

of the property conveyed, but they may force those creditors who, and who alone, are entitled to participate in the proceeds realized from the sale of the property "to divide up" with them. We quote from the concluding paragraph of the opinion of the Court of Appeals of Kentucky:

> "But only those creditors whose debts were created previous to December 4th, 1906, are entitled to participate in the proceeds realized from the sale of the property. If the proceeds amount to more than sufficient to pay such debts, the surplus should be paid to the grantees in the deed."

Suppose the property, voluntarily conveyed, had sold for twice as much as the debts created before the conveyance; can it be consistently held that one-half the proceeds must be paid over to the trustee for general distribution to all creditors alike and the other half paid to the grantees in the deed, who have no rights whatever as against the antecedent creditors? Such an interpretation of the law would produce, indeed, strange results, because the grantees in the deed would thereby get something they would have no right to as against the prior creditors, and the subsequent creditors would thereby get something that they have no right to as against the grantees, and the prior creditors would fail to get what the courts have determined they are entitled to as against both the grantees and the subsequent creditors. Such would necessarily be the result where the debts of the bankrupt are largely in excess of the assets, including the proceeds of the property voluntarily conveyed. And such is the situation in the Atkins case.

As stated in the opinion of the Kentucky Court of Appeals:

> "By the lower court it was further adjudged that, as the conveyance was not actually fraudulent, creditors whose debts were created after its execution were not entitled to have it set aside for their benefit; but these creditors are not complaining of the judgment."

The subsequent creditors accepted the judgment of the McCracken Circuit Court that they could have no interest in the property. The trustee, however, did appeal, and the Court of Appeals held that the trustee is entitled to handle the proceeds arising from the sale, but that the fund belongs to the prior creditors, and to them alone, to the extent of their debts, and that any surplus over the debts of the prior creditors should be paid to the grantees in the deed.

And now, in conclusion, permit us to recur to the idea that our rights are dependent upon the attachments, an idea which, though erroneous, seems to have taken root and spread some. No attachment was necesary to create the superior rights of the appellants. Their rights came into existence, as superior rights, the moment the voluntary conveyance was executed. The attachments added nothing whatever to their validity, nor to their priority. In fact, the superior and exclusive right of the appellants, under section 1907, Kentucky Statutes, to subject the property involved, was not dependent upon any attachment, nor even upon the institution of an action. The right arose when the deed was made, and continued from that moment. But under the provisions of the law of Kentucky, an action to enforce that right must be brought within ten years from the date of the execution of the voluntary conveyance, and after that time the period of "rest" begins. Likewise a contract right, under the Kentucky law, comes into existence when the contract is made, and the right to enforce that right arises when the contract matures, but after a certain number of years the statute of limitation will present an obstacle to the enforcement of the right.

The distinction must be recognized between a right created by law or contract on the one hand, and the right to enforce such a right on the other hand.

Under the practice in Kentucky, attachments are often resorted to, not for the purpose of creating a lien, but to preserve property already under lien; the attachment is a mere provisional remedy ancillary to an action commenced

at or before the time the attachment is sworn out, and there must be grounds for it other and further than the right to institute the action in which it is issued. It does not affect the decision of the case on the merits, and it may be dissolved and the action may proceed to judgment on the merits. The judgment in the courts of Kentucky, in the suits brought by the appellants against the grantees in the voluntary conveyance, would have been the same if there had been no attachments.

The filing of the suits were not even necessary to create the rights of appellants, because, as stated, their rights existed prior to that time and would have continued until long after the bankrupt's death and the settlement of his estate, and could have been enforced afterwards.

The attachments may have been useful for the purpose of preserving the property and also as against the life estate of T. J. Atkins, but not otherwise. The filing of the suits had the effect to protect the rights of the appellants against innocent purchasers from the grantees in the deed, but the rights of appellants as against the grantees were not dependent upon the filing of the suits nor the levying of attachments; nor were their rights against the bankrupt at all dependent upon the filing of the suits or the levying of the attachments, except as to his life interest in the property involved, which life interest terminated by the death of the bankrupt in the early part of the litigation.

It is, therefore, respectfully submitted that the decree of the Circuit Court of Appeals complained of is erroneous, and that it should be reversed.

Respectfully submitted,

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J. G. WHEELER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 99.

GLOBE BANK AND TRUST COMPANY OF PADUCAH, KENTUCKY, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, APPELLEE.

No. 100.

FIRST NATIONAL BANK OF PADUCAH, KENTUCKY, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, APPELLEE.

No. 101.

OLD STATE NATIONAL BANK OF EVANSVILLE, INDIANA, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, APPELLEE.

BRIEF FOR APPELLEE IN EACH OF THE FOREGOING CAUSES.

ARGUMENT.

Without appearing to be arguing elementary propositions of law, but in reply to the brief of counsel for appellant, we take up and wish to discuss the nature of the asserted liens

upon the property of the bankrupt in the action of the State Court under the Kentucky Statutes, and their relation to the provisions of the Bankruptcy Act.

Section 70*a* is as follows:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successors, if he shall have one or more, upon his or their appointment and qualification shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all—(4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Section 70*e* of the Bankruptcy Act is as follows:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

The section and its subsection absolutely fixed that title which Congress intended should be vested in the trustee in bankruptcy upon the adjudication and their language is very plain and explicit. In the case at bar we presume it will be conceded that the bankrupt, Atkins, transferred the property involved in the proceeding in the State courts, in actual or constructive fraud of his then existing creditors; if otherwise then his creditors would have had no cause of action.

Section 70*e* explicitly provides that the trustee may avoid *any transfer* by the bankrupt which any creditor might have avoided and it provides the forum in which such action may be brought. In the case at bar the forum having been chosen by the antecedent creditors of the bankrupt, prior to the adjudication, the trustee then availed himself of an independent action brought for the same uses and purposes and which action was thereafter consolidated with the then existing actions of the various banks.

The litigation in the State Court and the effect of the opinion of the Court of Appeals of Kentucky, has been ably argued in the brief of counsel for appellee.

If the title to the property conveyed in fraud of any creditor vested in the trustee, or if the right to proceed vested in any creditor, then the provisions of section 67*f* apply, and all of the steps required under that section for the purpose of obtaining the benefits of the legal proceedings for the subjection of the property of the bankrupt were preserved to the trustee.

Section 67*c*, Bankruptcy Act, is as follows:

> "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment, upon mesne process or a judgment by profession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to

the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

Section 67*e*, Bankruptcy Act, is as follows:

"That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchases in good faith and for a present fair consideration, and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Counsel for appellant rely upon the opinion of the Circuit Court of Appeals for the Sixth Circuit in the case of *In re*

Bennett as conclusive of the issues of the case at bar. There is a vast distinction between the liens accorded under section 2487 *et seq.*, Kentucky Statutes, and the liens acquired by the antecedent creditors of the bankrupt in this case.

Liens accorded under section 2487 *et seq.* are statutory liens given to mechanics and materialmen and arise by operation of law upon the happening of the contingencies mentioned in the statute. If the creditor presents his claim and claims this lien, as was said in *In re* Bennett, the lien may not be defeated by alienation act of the bankrupt or even death itself, but attaches to the *res* and the court administering the estate upon which the lien exists will respect and enforce it. It is essentially a lien accorded by statute and is differentiated from the lien acquired by legal proceedings, such as we have in this case.

The lien of the antecedent creditors in this case was created by, and obtained in a suit or proceeding in equity, begun against the bankrupt within four months before the filing of the petition in bankruptcy. It was an attachment upon mesne process, and if it be argued that the attachment was unnecessary, under section 1907*a* Kentucky Statutes, yet it was a lien upon mesne process, and, *ipso facto,* by adjudication of the bankrupt dissolved.

Cyc., volume 25-662, recognizes three classes of liens, the latter two of which it defines as equitable liens and statutory liens.

Section C:

> "An equitable lien is one which a court of equity recognizes as distinct from strictly legal rights, and is always ready to enforce regardless of what rights the applicant may have in a court of law. The term 'equitable lien' merely denotes a charge or encumbrance of one person upon the property of another. It is not a right of property in the subject-matter of the lien nor a right of action therefor, nor does it depend upon possession; but is merely a right to have the property subjected to the payment of a debt or claim, and it applies as well to charges arising by

express engagement of the owner of property as to a duty or intention implied on his part to make the property answerable for a specific debt or engagement."

Hines *vs.* Duncan, 58 American Rep., 580.
Peck *vs.* Jenness, 7 Howard, 612.
Shakers' Society *vs.* Watson, 15 C. C. A., 632.

The lien acquired by the antecedent creditors in this action falls under the head of equitable liens, as defined above. Provisions of the Kentucky Statutes merely declare the law, and Sec. 1907*a* merely provides for an adequate remedy.

Statutory liens are defined in the authority above quoted as follows:

Section D:

"Liens are also frequently defined or provided for by statute. Such statutes embrace in a modified form the common-law liens, and also frequently provide for liens in cases to which the common-law lien does not apply. Statutory liens, however, have been looked upon with jealousy, and generally will only be extended to cases expressly provided for by the statute, and then only where there has been a strict compliance with all the statutory requisites essential to their creation and existence. A statutory lien is provided for not only where the statute expressly declares that under certain circumstances a person shall have a lien upon a certain class of property for a debt or charge due, but also where it declares that a person shall have the right under given circumstances to hold certain property for or subject to the payment of a certain claim or charge, even though the word 'lien' is not used in the statute."

The liens enforced in the case of *In re* Bennett were statutory liens accorded various creditors who were mechanics and materialmen and who claimed under the provisions of section 2487 *et seq.*

In the happening of the contingencies provided for in section 2487 *et seq.* if the creditor was within the provisions

of those sections, then the lien attached to the *res* as a matter of right; if the judgment is rendered, or if the claim was sustained, then the lien was an incident to the debt.

The equitable liens acquired by the proceedings begun by the antecedent creditors in this matter were liens which the McCracken Circuit Court, as a court of equity, recognized and established as distinct from the legal rights of the plaintiffs.

In an action under section 1907 plaintiff, to secure the lien upon the property voluntarily conveyed, was required to prove that his debt was antecedent to the conveyance and that the conveyance without consideration thereby militated against his rights. In the case of Enders *vs.* Williams, 1 Metcalf, 346, it is said:

> "A distinction, however, has been made, so far as creditors are concerned, between a voluntary conveyance to the grantor's children and to strangers. In the former case, where there is no actual fraudulent intent, and the gift is a reasonable advancement to the child, considering the donor's condition in life, and there is ample estate left unincumbered for the payment of his debts, then such conveyance will be valid, even against antecedent creditors."

To the same effect is the case of Trimble *vs.* Ratcliffe, 9 B. Monroe, 514.

Liens acquired by the appellants in this matter were acquired by operation of law, and not by a right accorded under the statute, and are within the four months' provision.

The statutory lien, when it once attaches to the *res,* may not be defeated by any act of the parties, but the very language of section 1907 shows that the lien of this character may be defeated by act of the fraudulent vendee. The very institution of the equitable proceeding creates the *lis pendens* lien, and no lien attaches to any property so fraudulently conveyed, unless and until the creditor takes action.

In the case of Lyne, &c., *vs.* Bank of Kentucky, 5 J. J.

Marshall, 553, a case decided in 1831, the statute then being almost similar to section 1907, it is said:

> "It may safely be laid down as a correct rule at common law, as well as under the statutes of 13th and 27th Elizabeth, and our statute of frauds, that all voluntary conveyances made by grantors at a time they were oppressed by debts are ineffectual to vest property in the grantee so as to prevent antecedent creditors from subjecting it to the payment of their debts; provided, the property conveyed or transferred was of that description and character which the law made liable to the payment of the debts, had the conveyance never been made."

If this lien then only attached to the property fraudulently conveyed upon the institution of the action, it arose by operation of law, and not by statute, and comes within the provisions of section 67*c*, and was dissolved by the bankruptcy.

Again, section 1907 declares and amplifies a right of action, in which, prior to the Act of 1893 (section 1907*a*), it was necessary for the plaintiff to either procure a return of a *nulla bona*, or take an attachment against the property involved. This Act of 1896 allowed the *lis pendens* lien upon the filing of the petition with the necessary averments, but there is a further statute of the State of Kentucky, section 2358, which is as follows:

> "That no action, cross-action, counter-claim, or other proceeding whatever (save actions for forcible detainer or forcible entry or detainer) hereafter commenced or filed in which the title to, or the possession or use of, or any lien, tax, assessment, or charge on real estate, or any interest therein, is in any manner affected or involved, nor any judgment or order therein, nor any sale or other proceeding thereunder, shall in any manner affect the right, title or interest of any subsequent purchaser, lessee or incumbrancer of such real estate or interest for value and without notice thereof, except from the time when there shall be filed in the office of the clerk of the county in which such real estate, or a

greater part thereof lies, a memorandum stating (one) the number of said action where the action is numbered, and style of such action or proceeding and the court in which it is commenced, or is pending; (two) the name of the person whose right, title, interest in, or claim to, real estate is involved or affected; (three) a description of the real estate in said county thereby affected.

"The requirements of the section were complied with by appellant in case No. 430 (Transcript of Record, p. 62).

From the foregoing we confidently contend that the lien acquired by the appellants in this matter was one acquired by operation of law, obtained in or pursuant to a suit or proceeding in equity and being within the four months before the adjudication of bankruptcy of T. J. Atkins, it was, as to his trustee in bankruptcy, dissolved, except in so far as it was presented to the trustee for the benefit of the bankrupt estate, and all of the creditors of the bankrupt.

Respectfully submitted,

J. W. MOCQUOT,
Attorney for Trustee.

W. F. BRADSHAW,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 99.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, APPELLEE.

No. 100.

FIRST NATIONAL BANK OF PADUCAH, KENTUCKY, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, APPELLEE.

No. 101.

OLD STATE NATIONAL BANK OF EVANSVILLE, INDIANA, APPELLANT,

vs.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, APPELLEE.

No. 292.

ARTHUR Y. MARTIN, TRUSTEE IN BANKRUPTCY OF THOMAS JEREMIAH ATKINS, ET AL., PETITIONERS,

vs.

GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY, ET AL., RESPONDENTS.

BRIEF FOR APPELLEE IN Nos. 99, 100, 101, AND PETITIONERS IN No. 292.

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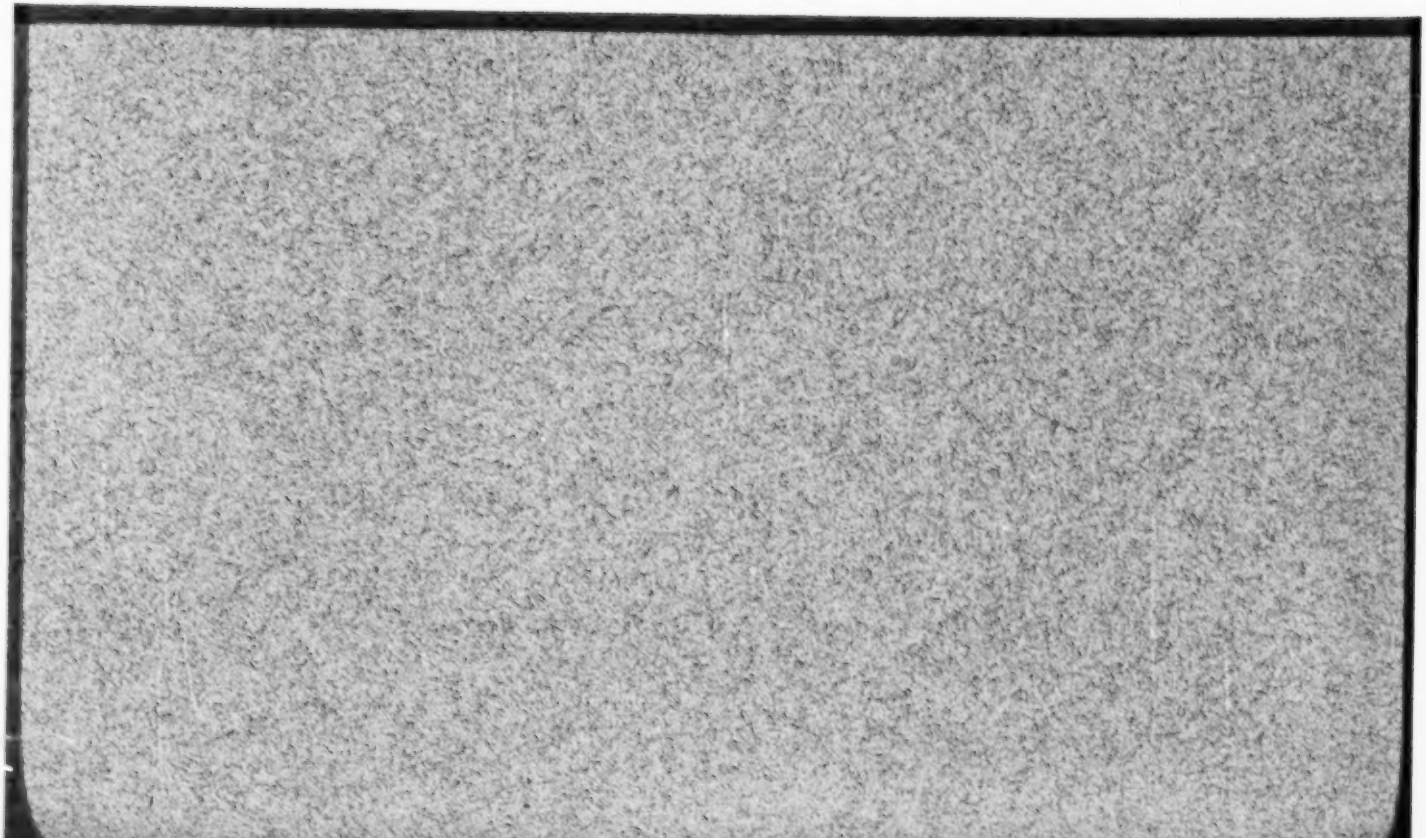
Attorneys for the Appellee and Petitioners for Writ of Certiorari.

J. D. MOCQUOT,
Of Counsel.



SUBJECT INDEX.

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Statement.

The statement of facts contained in the appellants' brief is incomplete and to some extent erroneous, and for that reason the following statement is submitted as embodying a more complete presentation of the facts of the record:

On December 4, 1906, Thomas Jeremiah Atkins conveyed various parcels of real estate situated in McCracken County, Kentucky, to his son, Ed. L. Atkins, and to his son's children. At the time the conveyance was made Atkins was indebted to the appellants, Globe Bank & Trust Company, First National Bank, and Old State National Bank, in sums aggregating over twenty thousand dollars ($20,000). After the execution and delivery of the deed the bankrupt incurred other indebtedness. The indebtedness to the three appellant banks will be referred to hereinafter as the antecedent indebtedness and the appellants as the antecedent creditors. The indebtedness created after the execution and delivery of the deed will be referred to hereinafter as the subsequent indebtedness and those creditors as the subsequent creditors.

During the months of August and September, 1908, the appellants instituted actions in the McCracken Circuit Court, a State court of Kentucky, seeking to set aside the deed of conveyance as fraudulent and to subject to the satisfaction of their debts the property conveyed, and at the time of the institution of the three separate actions each of the appellants had attachments issued and levied upon the property sought to be recovered.

On December 28, 1908, Atkins was adjudicated an involuntary bankrupt under proceedings in bankruptcy in-

stituted by creditors within four months of the commencement of the proceedings in the State court. Two sections of the Statutes of Kentucky were relied upon by the appellants in their actions in the State court, *i. e.*, section 1906, Carroll's Kentucky Statutes, edition 1903:

> "Every gift, conveyance, assignment or transfer of, or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to delay hinder or defraud creditors, purchasers or other persons, and every bond, or other evidence of debt given, action commenced, or judgment suffered, with like intent, shall be void, as against such creditors, purchasers and other persons. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor."

And section 1907, Carroll's Kentucky Statutes, edition 1903:

> "Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers."

On January 9, 1909, the Globe Bank & Trust Company filed a petition before the United States District Court for the Western District of Kentucky, wherein the bankruptcy proceeding was pending, setting up the proceedings instituted by it in the State court, including an allegation specifically alleging a lien by reason of its attachment, and challenging the jurisdiction of the district court to hear or

determine any question affecting the rights of the Globe Bank & Trust Company to the property or the proceeds arising therefrom which it was seeking to recover in the State court, but in the petition prayed that the court direct the trustee in bankruptcy to join with the petitioner in the effort to recover the property for the benefit of the attaching creditors (Record, pp. 33-36).

On January 20, 1909, before action was taken by the district court on this petition, the Globe Bank & Trust Company filed another petition in the district court setting forth certain other proceedings in respect of the State court suit, reaffirming its lien by reason of the attachment and pleading, also that in order to secure the priority of its *lis pendens* lien it had notice of such lien recorded in the office of the clerk of the McCracken County Court, the register of deeds, thereby under the Kentucky law establishing such lien by a recorded notice. In this petition the appellants prayed, "that its rights and equities acquired in such action be thus fully preserved and protected in full force and effect as against T. J. Atkins and all parties claiming under or through him by this court until such action is so prosecuted to final judgment, and until the proceeds so recovered for the benefit of this petitioner and for the bankrupt's estate and the other creditors, if any, who may be entitled to share with it in such proceeds shall have finally determined a distribution of the assets of the bankrupt by this court" (Record, pp. 61-67).

Thereafter on February 18, 1909, the district court entered an order directing "that any right or lien acquired by attachment, *lis pendens* or otherwise upon any property or interest of the bankrupt be preserved for the benefit of the bankrupt's estate as provided in section 67*f* of the bankruptcy act," and also in said order directed the trustee to institute an action for the recovery of said property or to implead in the actions then pending in the McCracken Circuit Court. Shortly after the entry of the order the trustee, obedient to the order of the district court, instituted an

action in the McCracken Circuit Court for the recovery of the property, and his action was, on motion of the appellants, consolidated with their three actions (Record, pp. 36-37).

Meanwhile, before the institution of the action by the trustee the appellants had filed their proofs of claim before the referee for the same debts upon which their suits were pending in the McCracken Circuit Court. The Old State National Bank in its proof of claim stated that it did not have nor had received any manner of security for said debt whatever (Record, pp. 28-29).

The First National Bank in its proof made the same statement (Record, p. 30).

The Globe Bank & Trust Company stated that it did not have nor had received any manner of security for its debt whatever except three collateral notes described in the proof and which are not involved herein, and further stated that, "an action is pending in the McCracken Circuit Court on such notes filed August 25, 1908, under which a lien is acquired and held on the real estate therein described attacking a deed as fraudulent" (Record, p. 27).

No order was ever made by the referee either allowing or disallowing any of the claims of appellants either in respect of their original proofs of claims or any amended proofs except the final order of the referee holding that the fund in contest belonged to the appellant banks by virtue of their rights existing under any liens acquired by their acts under the laws of Kentucky (Record, pp. 91-92).

No further steps were taken in the bankruptcy proceeding affecting the question here involved pending the outcome of the litigation in the State court. The McCracken Circuit Court adjudged the conveyance was fraudulent and voidable as to antecedent creditors and entered a judgment charging the property in the hands of the vendees with a sum equal to the antecedent indebtedness, but held the conveyance good as to subsequent creditors. In the judgment the court appointed the trustee in bankruptcy as

special commissioner of the McCracken Circuit Court, with authority to sell the property, or so much thereof as might be necessary, in order to realize the sum adjudged against it, and (Record, p. 16),

> "to collect the proceeds of sale so soon as the bonds are due and hold all of the proceeds subject to the final orders of this court in the further and final disposition of such proceeds, or subject to the District Court of the United States for the Western District of Kentucky in the matter of T. J. Atkins, bankrupt, now pending in such court under its final distribution of the entire assets of the estate of such bankrupt in the final adjustment and settlement of all its affairs before such court in such proceedings now pending therein in bankruptcy, and the rights of all creditors in such bankrupt proceedings in the distribution or disposition of such proceeds by the bankrupt estate are hereby reserved and not determined, but left open for final adjudication among them in such proceeding in bankruptcy."

Both the trustee and the vendees, defendants in the State court action, appealed to the Kentucky Court of Appeals. The trustee appealed because the order of the McCracken Circuit Court directed the proceeds of the sale to be held,

> "subject to the final orders of this court in the further and final disposition of such proceedings or subject to the District Court of the United States for the Western District of Kentucky in the matter of T. J. Atkins, bankrupt."

The trustee's objection being to the alternative direction contained in the judgment, and in his appeal he sought to have the fund paid over to him as trustee in bankruptcy to be distributed by the bankrupt court alone.

The vendees, defendants in the action in the State court, appealed on the whole case; that is, on the findings of the court that the deed was in any respect fraudulent or voidable.

The Court of Appeals affirmed the judgment of the circuit court and construed the judgment, as contended by the trustee, to mean that the fund should be paid over to the trustee in bankruptcy to be administered as a part of the bankrupt estate. In passing upon the appeal of the trustee the court said (Record, p. 23):

> "The judgment does not undertake to dispose of the proceeds that may be realized from the sale of the property, but leaves this question open for future determination and we do not doubt that when the court comes to make an order concerning the disposition of the proceeds in the hands of the trustee as special commissioner, it will direct that the proceeds be paid over to the trustee in bankruptcy to be administered as a part of the estate of the bankrupt in the bankruptcy court. In anticipation of what we assume the court will do, we may, with propriety in this opinion, direct that it make such orders. If the court in the judgment had undertaken to divest the trustee of the control of this fund, we would upon this point reverse the judgment, with directions to proceed as indicated, but as the court did not make such an order we are of the opinion that on the appeal of the trustee the judgment of the lower court should be affirmed."

On the appeal of the vendees the judgment was reversed because of an error in fixing the date of the delivery of the deed. The court held, in fact, that the deed was delivered at a date subsequent to December 4, 1906, and that one of the debts sued on by the Globe Bank & Trust Company was created subsequent to December 4, 1906, and the judgment was reduced $1,285, the amount of such subsequently created debt; in other respects the judgment of the lower court was affirmed, leaving the property charged with about $20,000 of antecedent indebtedness. In passing upon the appeal of the vendees the court said (Record, p. 24):

> "To what extent this will affect the judgment creditors, we are not advised; but only those credit-

> ors whose debts were created previous to December 4, 1905, are entitled to participate in the proceeds realized from the sale of the property. If the proceeds amount to more than sufficient to pay such debts, the surplus should be paid to the grantees in the deed."

Under the mandates of the Court of Appeals the circuit court entered judgment in favor of the banks in the same sums as were entered in its former judgment in June, 1909, less $1,285 from the judgment of the Globe Bank & Trust Company, and as to the other debts sued on it was adjudged that:

> "The deed is not fraudulent but is valid as provided and adjudged in the former judgment rendered in these consolidated cases on June 19, 1909, as aforesaid, and that no trust for the payment of any of such debts so created subsequent to the deed is herein declared or adjudged.
>
> "It is now further adjudged that the proceeds arising from the sale of the property described in the former judgment rendered June 19th, 1909, aforesaid shall be held by Arthur Y. Martin, trustee, and as special commissioner of this court under the terms and conditions of such former judgment until disposed of and distributed as is directed in such judgment" (Record, p. 26).

The property having been sold by the trustee as special commissioner realized a sum less than the antecedent indebtedness with which it was charged. After the sale of the property a report to the referee was made by the trustee of the fund in his hands; each of the appellants filed supplemental and amended proofs of claim setting up the various proceedings had in the State court above enumerated and claiming that by reason of such proceedings they had a prior and superior claim upon the fund and were entitled to the full amount thereof to the exclusion of other creditors of the estate of Atkins (Record, pp. 38-46).

The trustee traversed these various petitions and amendments, claiming the fund for the benefit of the estate generally (Record, pp. 46-49).

The referee on May 23, 1910, entered an order finding that the appellant banks were the only creditors of the bankrupt whose debts existed at the date of the delivery of the deed; that the proceeds derived from the sale of the property were insufficient to pay their debts; and that they were entitled to the entire fund and directed the trustee to pay the same to them pro rata upon their respective debts. Upon petition of the trustee for review this order was affirmed by the district court; the district court holding that the voluntary conveyance though voidable as to the then existing creditors of the bankrupt was not so as to the creditors whose debts were created after the deed was delivered; also,

> "That the *lis pendens* liens and the attachments in the suits in the State court were under order of this court entered herein on February 18, 1909, preserved for the benefit of the estate."

and, further,

> "That the construction of the Kentucky Statutes by the Court of Appeals in the cases referred to is binding upon this court, even if it did not (as it does) agree with the decision" (Record, pp. 51-52).

From the judgment of the district court the trustee and certain subsequent creditors sought a review by a proceeding for a superintendence and revision in matter of law under section 24*b* of the bankruptcy act. Following this, and within six months from the date of the entering of the order of the district court, the trustee appealed from the judgment to the Circuit Court of Appeals under section 24*a* of the bankruptcy act. The appeal and the revisory proceeding were considered together by the Circuit Court of Appeals, no issue having been raised by the appellant banks to either of the methods of review sought by the trustee and creditors.

The opinion of the Circuit Court of Appeals appears at pages 73-72 of the record, in which the action of the district court was reversed and the fund directed to be taken by the trustee for distribution generally among the creditors of the bankrupt estate. Following the entry of the decree of the Circuit Court of Appeals, the appellants made various motions looking to a modification of the decree and preparation of the record for appeal to this court (Record, pp. 88-93). Upon further hearing of the cases the Circuit Court of Appeals rendered a second judgment (Record, pp. 94-100) sustaining its jurisdiction on the appeal and affirming its judgment theretofore rendered and dismissing the petition, but in so doing the court stated (Record, p. 99):

> "It cannot escape observation that grave doubts arise in the practice, as also in the courts, as to what one of the appellate remedies should be adopted for reaching courts of appeals; and although counsel for the trustee ask the court to retain the petition to revise until the Supreme Court can pass upon the other questions of remedy we think we are bound to grant the motion to dismiss that petition; but we do so with the consciousness that any error committed in this respect can be rectified through writ of certiorari."

From the judgment of the Circuit Court of Appeals the appellants have taken this appeal to this court. As a precautionary measure in order to save the rights of the trustee in the event of error on the part of the Circuit Court of Appeals in sustaining its jurisdiction on the appeal and dismissing the petition for review, the trustee and the creditors who sought review in the Circuit Court of Appeals have filed a petition for a writ of certiorari in this court.

The appeal in this court and the certiorari involve the same facts and the same case. The question of remedy will be discussed in this brief, as counsel assume that the two proceedings will be heard together.

ARGUMENTS.

The appellants raise the question of jurisdiction of this court on both the appeal and the writ of certiorari. The same question was raised at the final hearing before the Circuit Court of Appeals; that is, that the trustee should have appealed to the Circuit Court of Appeals within ten days under section 25*a* of the bankruptcy act upon the theory that the order of the district court was one rejecting a claim of $500.00 or over. At the time of the argument before the Circuit Court of Appeals the record contained no order showing an allowance or disallowance of any of the claims filed by the appellants. Appellants contended that such an order existed, but had been omitted from the record. In fact, no such order was ever made, and before entry of the final decree of the Circuit Court of Appeals a stipulation was entered into between all the parties to this appeal, and which appears at page 92 of the record in part as follows:

> "That no order was made or appears in this bankruptcy proceeding in the original record in the office of the referee or of the district court, where the proceedings in bankruptcy were instituted, allowing or disallowing any of the claims filed by the respondents and appellees, either in respect of their original proofs of claim, or of the amended proofs or petitions of said banks, except the order of the referee of date May 23, 1910, which appears at pages 56, 57, and 58 of the record.
>
> "And it is further agreed by the parties hereto that this stipulation shall be considered as a part of the record in the two above-entitled cases."

In commenting upon this contention the Circuit Court of Appeals said:

> "It is enough to say now that neither the order of the referee nor the final decree of the court below pur-

ported to be an allowance of the debt or claim, as such, of any of these three banks. Indeed the debts as originally proved do not appear to have been questioned; that the sums so ordered to be paid on such claims were each materially less than the respective debts proved. The true analysis of the order is that it was an order of distribution. It was an order to distribute a fund derived from the recovery and sale of real estate, the conveyance of which has been made by the bankrupt in fraud of the rights of certain of his creditors as pointed out in our original decision. This fund was so acquired in pursuance of an order of the bankruptcy court; and the validity of the order distributing the fund cannot, we think, be rightly tested by any question of allowance of claim within the meaning of section 25*a*, but rather by the question whether the pertinent provisions of the bankruptcy act, or those of sections 1906, 1907, and 1907*a* of the Kentucky Statutes (Carroll's Ky. Stat., 1909, pp. 854 to 857), are controlling."

Appellate jurisdiction in the Circuit Court of Appeals can be acquired in only three kinds of issues arising in a bankruptcy proceeding in the district court, and there are four methods of procedure for acquiring such appellate jurisdiction:

First. Issues at law, reviewable by writ of error.

Second. Controversies arising in a bankruptcy proceeding, reviewable by appeal taken under the general appellate jurisdiction of the Circuit Court of Appeals, as well as under the express authority given in section 24*a* of the bankruptcy act.

Third. Bankruptcy proceedings, which are reviewable by two methods:

(1) By a petition for superintendence and revision in matter of law under section 24*b* of the bankruptcy act.

(2) In three enumerated kinds of proceedings by an appeal under section 25*a* of the bankruptcy act as in equity, available within ten days after the rendition of the judgment appealed from.

One of the three kinds of proceedings provided for under section 24*a* is from the allowance or rejection of a claim of $500 or over.

Two questions of primary importance are pre-ented and may be stated affirmatively as follows:

First. (1) That property transferred in fraud of creditors passes as an asset of the estate to the trustee upon the bankruptcy of the fraudulent grantor under section 70*a* (4) of the bankruptcy act, and

(2) That the right of action for the recovery of such property vests exclusively in the trustee under section 70*e* of the bankruptcy act, and

(3) That property so recovered and the funds arising therefrom become assets in the hands of the trustee for distribution generally among the creditors of the bankrupt estate and are not subject to distribution only among those creditors who, in the absence of bankruptcy, could have subjected the property to their debts alone under the law of the State.

Second. That even if the property conveyed in fraud of the bankrupt's creditors is available only to those creditors who, under the State law, could have subjected the property to their debts, nevertheless, if those creditors wait until within four months of the bankruptcy before instituting their actions for recovery of the property and then have attachments levied upon the property within four months of the bankruptcy, and the lien acquired by attachment is preserved under section 67*f* of the bankruptcy act, such lien and the funds realized therefrom become a part of the general assets in the hands of the trustee for distribution among all creditors.

The property in controversy was transferred by the bankrupt about two years before the bankruptcy, and less than four months before the bankruptcy the appellants instituted their actions and had their attachments levied upon the property. The actions were brought under sections 1906 and 1907 of the Kentucky Statutes, quoted in the statement.

These statutes merely declare a cause of action for the recovery of property conveyed in fraud of creditors, following in general the statute of 13 Elizabeth. No lien exists upon the property nor is any trust impressed upon it in favor of any creditor by reason of the conveyance being fraudulent. The most that is afforded creditors under the statutes quoted is a cause of action. Section 1907*a*, Kentucky Statutes, Carroll's edition, 1903, an amendment to section 1907, quoted in the statement, is as follows:

> "That hereafter in this Commonwealth it shall be lawful for any party who may be aggrieved thereby, when any real property has been fraudulently conveyed, transferred, or mortgaged, to file, in a court having jurisdiction of the subject-matter, a petition in equity against the parties to such fraudulent transfer or conveyance or mortgage, or their representatives or heirs, alleging therein the facts showing their right of action and alleging such fraud, or the facts constituting it, and describing such property, and when done a *lis pendens* shall be created upon the property so described and suit shall progress and be determined as other suits in equity, and as though it had been brought on a return of *nulla bona*, as has heretofore been required. All laws or parts of law in conflict herewith are hereby repealed."

Before the enactment of this statute the only means of fixing a lien upon the property was by attachment. This statute provides for the creation of a *lis pendens* lien *ipso facto* the filing of the suit. The appellants, in addition to the *lis pendens* lien which arose by operation of law with the filing of their suits within four months before the bankruptcy, had attachments levied upon the same property.

The appellants' suits were filed at different times, and, although they have joined issue in bankruptcy against the trustee and general creditors, there is no apparent reason for the issuance of attachments unless it was that each bank sought to gain a preference over any other creditor who might institute suits for the setting aside of the deeds. Such

action in the absence of bankruptcy would have afforded the attaching creditors priority in the order of their attachments. Neither the statutes nor the decisions of the Kentucky courts recognize antecedent creditors as a class in the sense of being equal beneficiaries in property fraudulently conveyed.

The creditor first suing and first levying an attachment upon the property acquires a prior lien as against other creditors to whose debts the property is subject. Stamper *vs.* Hibbs, 94 Ky., 358.

In appellants' brief it is stated (p. 15):

> "*In re* Bennett (153 Fed., 673) is so comprehensive and so clearly and definitely prescribes what effect shall be given to State laws which give priority to certain debts under the provisions of the bankrupt law that we feel justified in citing that opinion in full support of our position in these cases."

The holding in the Bennett case in connection with section 64*b* (5) seems to be the foundation upon which the appellants rest their case.

The decision in *In re* Bennett involved the construction and the application in the bankruptcy proceedings of sections 2487-2488, Kentucky Statutes, Carroll's edition, 1903.

Sec. 2487:

> "When the property or effects of any (mine), railroad, turnpike, canal, or other public improvement company, or of any owner or operator of any rolling mill, foundry, or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee, or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner, or operator, the employees of such company, owner, or operator in such business, and the persons who shall have furnished materials or supplies for the carrying on of such business, shall

have a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business."

Sec. 2488:

"The said lien shall be superior to the lien of any mortgage or other incumbrance thereafter created, and shall be for the whole amount due such employees, as such, or due for such materials or supplies; that for wages coming due to employees within six months before the property or effects shall in anywise come to be distributed among creditors, as provided in section 2487, the lien of such employees shall be superior to the lien of any mortgage or other incumbrance theretofore or thereafter created; but no president or other chief officer, nor any director or stockholder of any such company shall be deemed an employee within the meaning of this article."

The Court of Appeals of Kentucky as well as the Federal courts have construed these statutes to mean that persons within the favored class have an inchoate lien which becomes fixed *eo instanti* the suspension, bankruptcy or assignment of the manufacturing or other business within the class named in the statutes, and that those liens relate back to the time of the furnishing of the materials or supplies; in other words, the one who furnishes the material and supplies does so under a contract which carries with it an inchoate lien, which lien continues for the benefit of the creditor as long as his debt remains unpaid, and upon failure of the enterprise by any of the ways provided in the statute the lien *ipso facto* the failure fixes the right of the creditor over all other classes of creditors in the property and the effects of the business. It is then necessary only for the creditor to appear in the bankruptcy or liquidating proceedings and assert his claim as a superior lien claim on the assets of the business.

Sections 1906 and 1907, Kentucky Statutes, under which the appellants proceeded, afford to the antecedent creditors only a cause of action, but make no provision for the creation or existence of any inchoate lien or trust impressed upon the property from the date of the fraudulent conveyance or from the date of the creation of their debts, nor does any lien exist for the benefit of the antecedent creditors upon the institution of their actions. By virtue of section 1907*a* upon the institution of the action for the recovery of the property if there be a sufficient description of the property sought to be recovered a *lis pendens* lien arises *eo instanti* the filing of the suit. In addition to this lien the creditor suing has the right under the general law to attach the property sought to be recovered. The appellants pursued both courses to fix liens upon the property at the instant of filing their suits, and the only liens which they ever had were the *lis pendens* lien and the attachment lien, both of which arose with the filing of their suits and within four months before the bankruptcy.

The creditors proceeding in the Bennett case and in all other cases involving sections 2487-2488, Kentucky Statutes, were for the purpose of enforcing pre-existing liens. The suits filed by the appellants in the McCracken Circuit Court were brought for the purpose of creating liens.

In Hall *vs.* Guthrie, 103 S. W. Reporter, 721, decided by the Court of Appeals of Kentucky June 28, 1907, involving sections 2487-2488, Kentucky Statutes, it is said:

> "Under these provisions where an assignment is made for the benefit of creditors a lien arises when the assignment is made; and it is immaterial that more than sixty days has elapsed after the party asserting the lien ceased to labor or furnish material, or that he has not filed his claim in the county clerk's office. The lien arises by operation of law from the assignment, although there was no lien before the assignment was made."

Further:

> "Appellant had no lien until Guthrie's Sons made the assignment. Their lien was then established by virtue of the statutes and assignment."

In Winter *vs.* Howell's Assignee, 109 Ky., 163, the court, replying to the argument that a claimant had no lien under the statutes mentioned because they were enacted after his contract was made, says:

> "This contention cannot be maintained, for the reason that the employees were given no lien until the assignment was made. Their lien arising by virtue of the assignment and not attaching to the property until it was assigned for the benefit of the creditors must be governed by the law in force when the assignment was made."

The Court of Appeals of Kentucky in two cases arising under the bankruptcy act of 1867 involving the disposition of property fraudulently conveyed by the bankrupt and recovered in actions instituted under sections 1906 and 1907, Kentucky Statutes, held that the right of recovery after bankruptcy vested exclusively in the assignee as a part of the assets in his hands for distribution. Sections 5044-5046, of the act of 1867, contained provisions similar to 70*a* (4) and 70*e* of the act of 1898.

Anderson *vs.* Anderson, 80 Ky., 638.
Starks *vs.* Curd, 88 Ky., 164.

The antecedent creditors possessed merely a right of action. This right of action could have been asserted by them at any time after their right of action arose, and had they exercised their right and subjected the property to their debts more than four months before the bankruptcy, they would have been secure in their preference. But as long as the property remained in the possession of the fraudulent vendees it remained property conveyed in fraud of creditors and upon bankruptcy vested in the trustee.

Even had neither a *lis pendens* lien nor an attachment lien been levied upon the property by the appellants, the property would nevertheless have passed to the trustee, as their actions without seizure of the property could have afforded them no advantage. As long as the property remained in the possession of the fraudulent vendees, and was in fact still property conveyed in fraud of creditors, the trustee alone had the right to have the conveyance set aside.

> "We are forced to the conclusion that the right of the trustee to prosecute this suit was not limited to the conveyance or transfer within four months previous to the filing of the petition, but that it would be the duty to attack all such conveyances antedating that period. In fact by the bankrupt act the trustee was vested with the sole power so to do." Ruhl-Koblegard *vs.* Gillespie, 61 W. Va., 584; 56 S. E., 898.
>
> Trimble *vs.* Woodhead, 102 U. S., 647.
> Moyer *vs.* Dewey, 103 U. S., 301.
> Buffington vs. Harvey, 95 U. S., 99.
> Hunt *vs.* Doyal, 57 S. E., 489 (Ga., 1907).
> Williamson *vs.* Selden, 54 N. W., 1055; 53 Minn., 73.
> Wm. H. Gray, 3 Am. Bankruptcy, 647; 62 N. Y. Supp., 618.

In Glenny *vs.* Langden, 98 U. S., 20, this court says:

> "Creditors have no remedy which will reach property fraudulently conveyed, except through the assignee, for two reasons: (1) Because all such property by the express words of the bankrupt act, vests in the assignee by virtue of the adjudication in bankruptcy and of his appointment. (2) Because they cannot sustain any suit against the bankrupt."

In Clark *vs.* Larremore, 188 U. S., 486, at page 490, this court says:

> "A different question might have arisen if the writ had been fully executed by payment to the execution creditor. Whether the bankruptcy proceedings would then so far affect the judgment and execution, and

> that which was done under them, as to justify a reconvey by the trustee in bankruptcy from the execution creditor, is a question not before us, and may depend on many other considerations."
>
> Bush *vs.* Export Storage Company, 136 Fed., 918.

In Annis *vs.* Butterfield, 58 Atlantic, 898 (Me., 1904), an action by a creditor for the recovery of property conveyed by the bankrupt in fraud of his creditors, the court says:

> "Although he has been a creditor, and before the bankruptcy proceedings were instituted might have maintained proceedings to have the conveyance set aside, yet when the bankruptcy proceedings were instituted, all his rights passed to the trustee and the power was expressly given by the statute to the trustee to avoid such transfer. After that the plaintiff as creditor has no right which he could enforce."

In re Downing, 201 Fed., 93, it is held that the bankrupt's trustee has a transferable interest in real estate owned by the bankrupt and transferred by him in fraud of creditors, although such transfer was made more than four months prior to the institution of the bankruptcy proceedings, and that the trustee may sell such interest with the right to sue and to set aside such fraudulent transaction.

It is earnestly insisted by the appellants that inasmuch as they alone, in the absence of bankruptcy, could have recovered the property for their own benefit, that the mere fact of bankruptcy should not deprive them of the fund available only to them in the absence of bankruptcy.

In First National Bank *vs.* Staake, 202 U. S., 141, precisely the same argument was made.

The facts and issues in that case are strikingly similar to those involved in the instant case. The lien obtained by the creditors claiming the priority was preserved as in this case by the order of the district court for the benefit of the bankrupt estate. In that case the bankruptcy operated to

discharge the attachment. Under the law of Virginia, the vendee of the property who held an unrecorded deed would have been vested with a good title to the property had the bankruptcy act operated only to discharge the attachment. But instead of discharging the attachment, and thereby leaving the vendee with the unrecorded deed possessed of a good title, the court of bankruptcy preserved the attachment lien under which the attaching creditors would have acquired a priority, passed that lien to the trustee for the benefit of the whole estate, and the proceeds arising from the recovery of the property came into the hands of the trustee for general distribution. (The opinion of the Supreme Court does not show the disposition subsequently made of the funds arising from the property recovery, but in fact the funds recovered were distributed generally among the creditors under orders of the referee and the district court in which the proceedings originated.)

The argument was made in that case that such operation of the bankruptcy act would have the unjust effect of depriving a certain class of creditors of advantages and benefits to which they were entitled under the State law, and that they should not be required to share property recoverable only by them with the general creditors,

> "that the bankruptcy court has nothing to do with the property, since it really did not belong to the bankrupt, and would have passed to his vendee if the attachments had not been levied on it,"

to which this court replied that to avoid such a result was one of the purposes of the bankruptcy act.

In Clark *vs.* Larremore, 188 U. S., 486, the same principle was similarly applied. There a sheriff had sold the property on execution, but before paying the money to the judgment creditor, though still within the time allowed for the return of the execution, bankruptcy proceedings were begun against the judgment debtor. It was held that the money did not

belong to the judgment creditor, and that under 67*f* the right to it passed to the trustee in bankruptcy.

The Circuit Court of Appeals considered not only the fact that the property passed to the trustee (section 70*a* (4), bankruptcy act), together with the right of action for the recovery thereof (section 70*e*, bankruptcy act), but also the fact that the appellants had seized upon the property by two liens—a *lis pendens* lien and the attachment lien—within four months, which liens, at the instance of the appellants, were preserved under section 67*f* and passed to the trustee for the benefit of the estate. The Circuit Court of Appeals did not consider alone the attachments nor base its opinion upon the rights acquired by creditors through the attachments. It is stated in appellants' brief (p. 10) "that appellants do not rest their case nor base their rights to the proceeds of the property involved upon any such claim"—*i. e.*, the attachment liens. It is inconceivable why the appellants should have procured the attachments, unless they were seeking some advantage thereby, nor why, after the bankruptcy, they should have voluntarily entered the Federal jurisdiction and sought to have the attachments preserved and passed to the trustee, unless they thereby sought some profit for themselves. It is not to be assumed, in light of their subsequent attitude, that this action was intended for the benefit of any other creditors than themselves. That the appellants conceived their hold upon the property to rest in a large measure, if not wholly, upon the attachments is shown by the emphasis placed by them upon their attachment liens throughout these proceedings until the appeal to this court. We call the attention of the court to the following pleadings filed by the appellants, in which their rights under the attachments are repeatedly reaffirmed, appearing in the record at page 34, lines 13-16; page 43, paragraphs 1 and 2; page 45, last paragraph; page 62, paragraph 2; page 68, paragraphs 1 and 2; pages 69 and 70, paragraph 1.

All of the issues as to the appellants' rights by reason of

the liens acquired by them were raised by them, and in the trial court as well as the Circuit Court of Appeals the issues so raised by the appellants and presented by them as the foundation of their rights were considered by the court. The denial that such was ever an issue or relied upon by appellants is wanting in candor and will not be countenanced by an appellate court.

> "But it is urged that as the proceeding below was a controversy between the creditor and Munsuri as to whether he was liable as a general partner, the matter before us is susceptible of being treated as a controversy arising in bankruptcy, and as distinct from a step in bankruptcy proceedings. But under the circumstances here disclosed, the contention is wanting in candor. We say this because the appeal was specifically taken from the order as one disallowing the claim of the appellees of an alleged indebtedness to them from the bankrupt firm, and such was the character necessarily attributed to the order by the judge when he entered it, and which was affixed to it by the assignment of error filed at the time the appeal was taken." Tefft, Weller & Company *vs.* Munsuri, 222 U. S., 114.

It is urged that the Kentucky Court of Appeals, in affirming the judgment of the McCracken Circuit Court setting aside the deed as fraudulent, directed the disposition to be made of the proceeds arising from the property, and that this judgment stands unmodified and unreversed and is, therefore, binding on the Federal courts in the matter of distributing the fund in bankruptcy. An analysis of this contention by the Circuit Court of Appeals in the first opinion (Record, pp. 73-82) is sufficiently clear and convincing. In considering the appeal of the trustee by which he sought specific directions to have the fund turned over to the bankruptcy court for distribution the Court of Appeals of Kentucky sustained the construction of the judgment contended for by the trustee, and said:

> "That the proceeds should be paid over to the trustee in bankruptcy to be administered as a part of the estate of the bankrupt in the bankruptcy court. In anticipation of what we assume the court will do, we may, with propriety, in this question direct that it make such orders."

At the time of the trial in the State court the antecedent indebtedness amounted to about $25,000. The property was chargeable only to the extent of the antecedent indebtedness, and on the appeal of the vendees, after disposing of the trustee's appeal, the Court of Appeals of Kentucky said:

> "As to what extent this will affect the judgment creditors we are not advised, but only those creditors whose debts were created previous to December 4, 1906 (date of delivery of deed), are entitled to participate in the proceeds realized from the sale of the property. If the proceeds amount to more than sufficient to pay such debts, the surplus should be paid to the grantees in the deed" (Record, p. 24).

It is manifest that in making the latter statement the Court of Appeals of Kentucky had in mind only that branch of the case involving the rights of the antecedent creditors and the fraudulent vendee. The context shows this, and any other construction would make the judgment contradictory and unintelligible. The failure of the Court of Appeals of Kentucky to express itself with such precision as not to admit of misinterpretation has given rise to the contention that the court, after specifically denying the right of the State court to administer the fund, then by the sentence last quoted undertook to direct the distribution. Even if the State courts of Kentucky had undertaken to direct the disposition of the fund, their orders in that respect would have no controlling force over the exclusive right of the court of bankruptcy to apply the rule of distribution of the Federal jurisdiction. The authority of the trustee in bankruptcy in the State court was to use the machinery of that court only for the purpose

of setting aside the fraudulent conveyance and converting the property when recovered into money, and the power of the State court was limited to that service. The State court was not the forum in which the creditors could have determined the rights among themselves to the distribution of this fund, although this issue was repeatedly presented by the appellants to the State courts and the State courts as distinctly avoided deciding the issue.

A distinction is observable between the attitude of the appellants in the State court and in the Federal court, and that distinction gives rise to the doubt as to the proper remedy on appeal to the Circuit Court of Appeals.

(1) In the State court the appellants contended that under the State law, the rights of action being theirs alone as antecedent creditors, they were entitled to the whole corpus of the fund and denied the right of the trustee to interfere with their recovery of the property. At the first appearance of the appellants in the Federal jurisdiction, they came for the purpose of protesting against the right of the trustee to interfere with their suits in the State court and their right to recover the property to the exclusion of other creditors (Record, p. 33, third paragraph; page 35, first paragraph).

(2) After the order of the district court preserving the liens for the benefit of the estate in bankruptcy the appellants in the bankruptcy court took the position that they were entitled to a priority in distribution of the fund to the extent of the payment in full of their debts by reason of their liens fixed upon the property (Record, p. 43, first paragraph; 45, last paragraph; 62, second paragraph; 68, first and second paragraphs; 69-70, first paragraph of replication).

Appellants now present their claim to the fund solely upon another ground. It is stated in appellants' brief:

> "The appellants' claim to preference in the distribution of the proceeds of the sale of the property which was recovered from the grantees in the deed referred to, under the judgment of the courts of the State of

> Kentucky, are based solely upon their right to recover said property which accrued when the conveyance, without valuable consideration, was executed and filed for record."

The claim now is not that the bankruptcy court has not jurisdiction to take and distribute the fund, nor that the appellants are entitled to the fund because of their liens, but that the corpus of the fund representing the property recoverable only by them under the State law in the absence of bankruptcy should, in the event of bankruptcy, be turned over to them through an order of distribution giving them a preference over other creditors.

Procedure on Appeal.

The shifting position assumed in the different courts by the appellants in this litigation gave rise to the question of remedy on appeal, which occupied so much of the attention of the Circuit Court of Appeals and was the occasion for the rendition of two opinions in the case.

The best accredited distinction between "controversy arising in a bankruptcy proceeding," appealable under section 24*a*, and "proceedings in bankruptcy," reviewable under section 24*b*, is that made by the Circuit Court of Appeals for the Sixth Circuit in *In re* Mueller, 135 Fed., 711, and approved by this court in *In re* Loving, 224 U. S., 183:

> "By controversy arising in bankruptcy proceeding is meant those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors."
>
> "The proceedings reviewable are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of a petition and the final settlement of the estate, which are not made especially appealable under section 25*a*. This would in-

> cludequestions between the bankrupt and hiscreditors of an administrative character, and exclude such matters are appealable under section 24*a*."

The development of the twofold aspect of this case may be briefly traced as follows:

At the time of the institution of the bankruptcy proceedings the property in controversy was in the custody of neither the trustee nor the appellants as creditors of the estate, but was in the possession of the fraudulent vendees, who were resisting alike the attacks of the appellants and the trustee. In the bankruptcy proceeding appellants filed their proofs of claim as unsecured debts. There was no objection to the allowance or disallowance of these claims as unsecured debts, and, following the custom of the referee's court, but claims stood allowed as unsecured claims. The appellants by their petitions filed before the district court (Record, pp. 33-37):

(1) Challenged the authority of the district court to interfere with their proceedings in the State court.

(2) Prayed that the trustee be directed to unite with the appellants in the State court actions for the recovery of the property.

(3) That the rights and equities acquired by the appellants through their attachment and *lis pendens* liens be fully protected and preserved.

The district court (Record, p. 36) granted the prayer to preserve the lien and did so.

After the trustee had in the State court recovered the property, and the fund arising therefrom had been paid over to the trustee, petitions were filed before the referee by the appellants, in which it was alleged that only those creditors whose debts were created previous to December 4, 1906, were entitled to participate in the proceeds arising from the sale of the property, and that all proceeds so recovered should be adjudged to and distributed pro rata among those creditors (Record, pp. 38-46).

The allegations here consist:

(1) Of the claim of the Globe Bank & Trust Company in its own behalf and that of the other two appellants of the exclusive right to the whole fund—that the corpus of the fund belonged to the antecedent creditors (Record, pp. 38-41; the claim by the First National Bank and Old State National Bank of a right to the fund by reason of their attachments as well as "by operation of law" as antecedent creditors.

(2) A prayer for an order of distribution of the fund only among the antecedent creditors.

The referee followed the general line of the appellants' pleadings in his order adjudging two classes of creditors, and that the antecedent creditors were entitled to the corpus of the fund and made an order distributing it pro rata among them, and the district court took the same view of the matter.

The question may then be resolved into these two propositions:

First. If the controversy continued as it began and is to be regarded as a controversy between the trustee on one hand and certain creditors on the other over a fund in the possession of a third party, and that without waiving any of their rights or claims to the adverse possession of the fund, that fund at the instance of the adverse claimants and with the acquiescence of the trustee was merely put into custody of the bankruptcy court pending the final determination of the rights of the trustee and the adverse claimants over the corpus of the fund, then the controversy is clearly a controversy arising in bankruptcy proceeding and cognizable under section 24*a* by the Circuit Court of Appeals and appealable to the Supreme Court in the exercise of its general appellate jurisdiction as in equity.

Second. If, on the other hand, the appearance of the appellees and their various and varying petitions be construed as a waiver of their adverse claim to the corpus of the fund

and a substitution for that contention of a claim to a preference in the right of distribution—that is, an admission by such petitions and pleas that the bankruptcy court and its trustee had a right to the possession and control of the corpus of the fund, but that the distribution of that fund in bankruptcy was governed by the rule of distribution that would have prevailed in the State court in the absence of bankruptcy, then the controversy is probably a proceeding in bankruptcy; that is, one of

> "Those administrative orders and decrees in the ordinary course of bankruptcy between the filing of the petition and final settlement of the estate, which are not made especially appealable under section 25*a*, involving only a question of law."
>
> *In re* Mueller, 135 Fed., 711.

The district court evidently took the view that the question involved was a contest over the ownership of the fund (Record, p. 36).

In the opinion of the district court it is said:

> "That the subsequent creditors having no interest in the land embraced in said conveyance under the law of Kentucky, or under the general principles of equity applicable to voluntary conveyances not actually fraudulent, there was nothing in the *lis pendens*, or in the attachments, nor otherwise, that created for such subsequent creditors any interest in the proceeds of the land" (Record, 36-37).

From this point of view this case is almost identical in essential facts with:

Knapp *vs.* Milwaukee Trust Company, 216 U. S., 545.

Hewit *vs.* Berlin Machine Works, 194 U. S., 296.

York Manufacturing Company *vs.* Cassell, 201 U. S., 344.

Security Warehousing Company *vs.* Hand, 206 U. S., 415.

> "It is therefore apparent that the mode of appeal in a given case depends upon the character of the proceeding."
>
> Coder *vs.* Arts, 213 U. S., 223.

After the action for the recovery of the property had been instituted by the trustee in a court of bankruptcy under section 70*e*, and a contest over the right of the trustee to the fund had arisen between the trustee and these adversely claiming creditors, clearly all questions affecting the fund in controversy arising as an incident thereto would have been controlled by the procedure governing the principal issues.

Coder *vs.* Arts; *In re* Loving.

Does the fact that the bankruptcy court use the machinery of the State court for the recovery of the property instead of its machinery affect the nature of the controversy between the trustee and these adverse claimants over the fund when recovered and brought into the bankruptcy jurisdiction?

If an appeal under section 24*a* was the proper method of acquiring appellate jurisdiction in this court, then an appeal from the decree of the Circuit Court of Appeals lies to the Supreme Court as a matter of right under the general appellate jurisdiction of the Supreme Court in equity, and not under the procedure laid down by section 25*b* of the bankruptcy act and general order No. 36, prescribing the manner of procedure under that section of the bankruptcy act.

Knapp *vs.* Milwaukee Trust Company, 216 U. S., 545.

Thomas *vs.* Sugarman, 218 U. S., 129.

> "A controversy arising in bankruptcy is usually presented by a contest between the trustee and the third person with respect to title to property claimed to belong to the estate. Such contests do not in every instance present a controversy arising in bankruptcy.

> Some may be determined in the bankruptcy proceedings proper. It is not always easy to distinguish between them."
>
> Loveland, 4th ed., vol. 1, 88.

The line of demarkation between the two classes of cases is indistinct, and is often exceedingly difficult, if not impossible, to distinguish.

In Duryea Power Company *vs.* Sternbergh, 218 U. S., 299, it is said:

> "It is argued that an appeal to the Circuit Court of Appeals may be treated as a petition for revision (Holden *vs.* Stratton, 191 U. S., 115), and that conversely the petition for revision may be turned into an appeal, or at least treated as one, for the purpose of an appeal to this court, if only to establish that the Circuit Court of Appeals exceeded its jurisdiction. There are two answers to this contention. In the first place, the converse proposition does not hold. An appeal opens both fact and law, and therefore might be regarded as intended to raise questions of law in any way that might be deemed proper. But the petition for revision opens only questions of law, and when the foundation of its jurisdiction is thus narrowed, the action of the court cannot enlarge it so as to deal with facts."

In Bryan *vs.* Bernheimer, 181 U. S., 188, on a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit to review an order of that court in a bankruptcy proceeding, the Supreme Court said:

> "Bernheimer appealed to the Circuit Court of Appeals, which, considering the case as if before it on a petition for revision of the decree of the district court, reversed that decree and ordered the question to be remanded."

The Supreme Court evidently approved the action of the Circuit Court of Appeals in thus considering an appeal as if it were a petition for revision, because, instead of dismissing

the writ of certiorari, it sustained the jurisdiction thereby acquired, considering the case on its merits and reversed the Circuit Court of Appeals.

Considering now the second aspect of the case as above stated, viz: That the appellees had abandoned their adverse claim to the possession of the fund and were relying only upon the proposition of law that their right of distribution fixed by the State law would be preserved in bankruptcy, and that the whole fund should be awarded to them by reason of a priority afforded under the State law—it is probable that in such a view of the case the issues between the parties constituted a proceeding in bankruptcy involving only a question of law and reviewable under section 24*b*.

In First National Bank *vs.* Chicago Title & Trust Company, 198 U. S., 280, the property in controversy consisted of goods in the actual possession of a warehouseman, and the equitable ownership of which was claimed adversely to the trustee by a bank holding warehouse receipts. The trustee filed a petition against the party in possession and the adverse claimants claiming that the property had passed to him as a part of the estate in bankruptcy, the referee held that the property was in the possession of the storage company, and that the district court was without jurisdiction. Subsequently the district court confirmed the referee's finding as to the possession, but overruled his findings as to the jurisdiction holding that the district court had jurisdiction, and then with the consent of the adverse claimants, viz., the holders of the warehouse receipts, ordered the property sold. And further held that the claimants holding the warehouse receipts were entitled to be paid out of the fund realized from the sale of the property. Thereupon the trustee appealed from said order to the Circuit Court of Appeals. The Circuit Court of Appeals decided that the storage company was not in possession of the property, and remanded the case with directions to enter a decree for the trustee. The situation then was this: If the property in controversy was not in the possession of the

storage company, then there was only a controversy between the trustee and adverse claimants over property in the possession of the trustee, and the question between them was a proceeding in bankruptcy and not a controversy arising out of a bankruptcy proceeding, and the appeal should have been dismissed. Yet the Circuit Court of Appeals treated the appeals as in fact petitions for revision. Under such circumstances if it retained jurisdiction its powers were limited to a revision of the law involved and not of facts. Therefore, if the Circuit Court of Appeals in fact regarded the appeals as petitions for revision, its attempt to reverse the district court on a question of fact, to wit the possession of the property, was an error.

The matter was taken from the Circuit Court of Appeals to the Supreme Court on certiorari, and this court assumed jurisdiction, evidently upon the theory that the appeals were treated as petitions for revision, and reversed the Circuit Court of Appeals in so far as it undertook to change the findings of fact as determined by the referee and the district court.

The points of similarity between that case and the instant case are striking. In both cases, originally, the property was in the actual possession of third parties. In that case the claimants rested their right upon the warehouse receipts representing the property. In this case, upon attachment liens levied upon the property before bankruptcy. In both cases the jurisdiction of the bankruptcy court was challenged by the claimants. Later, in both cases, by consent of the claimants, the property was sold and the fund representing it was placed in possession of the trustee in bankruptcy, without, however, waiving any rights of the claimants to the fund. (Whether that right rested upon a claim to the fund in bulk or to a right of distribution is equally difficult to determine in both cases.) In both cases the asserted claim to the fund was allowed by the district court. In that case the appeal was taken by the trustee only by an

appeal under section 24*a*; in this case relief was sought from the decree of the district court by an appeal under section 24*a* and by a petition for review. In that case the appeal was considered as if it were a petition for review, and the Supreme Court on certionari evidently approved of the action of the Circuit Court of Appeals in so regarding the appeal, otherwise it would have dismissed the writ because certiorari does not lie from an appeal proper.

In Holden *vs.* Stratton, 191 U. S., 115, certain insurance policies issued upon the life of one of the bankrupts and payable to the other bankrupt, and which had a cash surrender value, passed as assets in bankruptcy to the trustee. The policies were claimed as exempt to the bankrupts. The district court held the policies to be exempt. The trustee then filed his petition for revision to the Circuit Court of Appeals. That court held the policies not exempt and decreed a revision of the order of the district court. From that decree an appeal was taken to the Supreme Court. The appeal, upon motion, was dismissed by the Supreme Court for lack of jurisdiction. The Supreme Court says, page 118:

> "This case was not taken to the Court of Appeals by appeal, as in equity cases, to be re-examined on the facts as well as the law, nor could it have been, for it was not one of the cases enumerated in section 25*a*."

In the same opinion, page 118, in discussing section 24*a* of the bankruptcy act, prescribing a different procedure for acquiring appellate jurisdiction in certain enumerated proceedings in bankruptcy which are excepted from the general class of proceedings in bankruptcy referred to in section 24*b*, the court says:

> "The allowance of a debt or claim is a part of the bankruptcy proceedings, and not an independent suit, and under the act of 1867 it was held that this court had no jurisdiction to review judgments of the circuit courts dealing with the action of the district courts in such allowance or rejection, because they were not final. Wiswall *vs.* Campbell, 98 U. S., 47; Leggett

> *vs.* Allen, 110 U. S., 741. The jurisdiction now given is carefully restricted and cannot be expanded beyond the letter of the grant. It is an exception to the general rule as to appeals and writs of error obtaining from the foundation of our judicial system." McLish *vs.* Roff, 141 U. S., 661.

In Bryan *vs.* Bernheimer, 181 U. S., 188, the assignee under a deed of assignment made pursuant to a State law, and before the bankruptcy, sold to Bernheimer, after the institution of the bankruptcy proceedings and when Bernheimer had knowledge of the proceedings, a part of the property which came into the hands of the assignee. The petitioning creditors and the marshal sought, by an action instituted in the district court, to recover from Bernheimer the property which he had so bought and paid the assignee for, and that Bernheimer be required to account for the value of the goods which he had already disposed of. Bernheimer admitted the possession of the goods by him, but plead no adverse right of possession; that the amount which he had paid for the goods to the assignee had passed to the trustee, and that he should either be allowed to keep the goods, or the trustee should be required to pay back to him the amount paid by him to the assignee and he be permitted to return the goods or their value to the trustee.

The district court adjudged that Bernheimer had acquired no title to the goods nor to the proceeds of the sales made by him, and directed him to pay to the marshal all proceeds so realized by him from sales of the goods. Bernheimer appealed to the Circuit Court of Appeals,

> "which considering the case as if before it on a petition for revision of a decree of the district court, reversed that decree and ordered the question to be remanded to that court with instructions to dismiss the petition against Bernheimer."

The marshal thereupon obtained a writ of certiorari from the Supreme Court. The Supreme Court entertained juris-

diction and considered the case on its merits. In the opinion the court says, page 194:

> "The present case involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself."

Page 197:

> "Moreover, the consent of the proposed defendant, Bernheimer, to this mode of proceeding, is shown by the terms of his claim, in which, not protesting against the jurisdiction of the court of bankruptcy, he expressly submitted his claim to that court, and asked for such orders as might be necessary for his protection."

Assuming that the claimants had abandoned their adverse claim to the corpus of the fund, and were claiming the right of protection under an order of distribution in bankruptcy, then the facts in Bryan *vs.* Bernheimer are similar to those of the instant case. The question then resolved itself in the Bernheimer case into one of law only, to wit: the making of an order which would afford him substantial justice.

In the instant case, assuming the issues as above stated, there would be no question of adverse claim to a fund, but only the making of an order determining the right of the claimants in the fund in the possession of the bankruptcy court—that is, whether those rights are governed by the State or bankruptcy rule of distribution, and whether the claimants have any greater right to the fund than the trustee and general creditors.

On the Rule of Distribution.

By whatever means the fund may have been recovered, after it was paid into the bankrupcy court the disposition of the fund is determined by the rules of distribution prevailing under the bankruptcy law and not under the State laws operative if bankruptcy had not intervened. The mission

and authority of the trustee to enter the McCracken Circuit Court were simply to recover such funds as were open to recovery on the part of creditors of the bankrupt.

Acme Harvester Company *vs.* Beekman Lumber Company, 222 U. S., 307.

First National Bank *vs.* Staake, 202 U. S., 141.

Miller *vs.* New Orleans Fertilizer Company, 211 U. S., 496.

In the last case the question arose in a bankruptcy proceeding against a copartnership, touching the distribution of assets belonging to one of the individual members of the firm. It was pointed out by the present learned chief justice that while under the law of Louisiana the creditors of a partnership are as to firm assets given preference over creditors of individual members of a firm, yet that partnership creditors and creditors of the individual partners have equal rights in the individual assets. Of course this last feature is opposed to the corresponding feature of the bankruptcy act. The trustee in bankruptcy brought an action in a State court to annul any transactions affecting the property of the bankrupts, and to recover judgment for the benefit of the bankrupt estate. Certain other actions were then pending in the State court to recover upon claims held against the firm and for the further purpose of having certain sales of property set aside and the proceeds applied to the payment of their claims, which sales had been made by one member of the firm of his individual property. The trustee was by order of the State court substituted as party plaintiff in those suits in his capacity as trustee of the bankrupt estate. In the course of the opinion it was said (505):

> "Assuming, therefore, that the trustee was properly authorized, it follows that he was entitled to preserve and enforce the privilege or lien, which arose in favor of the creditors, resulting from their pending action, even although the cause of action

> arose from the State law, and the application of that law was essential to secure the relief sought. To the accomplishment of this end the bankrupt law was cumulative and did not abrogate the State law."

Recalling the difference between the law of Louisiana and the bankruptcy act touching the distribution of assets belonging to individual members of a Louisiana partnership, the following we think is controlling (506):

> "In view of the distinction between the estate of partnerships and the estates of the members of the firm, which is made by the bankrupt law, and the method of distinction for which that law provides, of course the trustee will hold the fund as an asset of the estate of the individual member, and primarily for the benefit of his creditors."

Further, upon the question of distribution, the learned justice recognized the power of the State court to pass upon the question of preference, but denied its right to determine what creditors were to participate in the distribution. He said (506):

> "The one (the question of preference) was within the province of the State court for the purpose of the case before it; the other (the matter of distribution) was a different question, depending upon independent considerations exclusively cognizable in the bankruptcy court;"

and since the State court had itself so decided, its judgment was affirmed.

Section 64*b* (5) of the bankruptcy act has no application to the question involved in these appeals. Section 64*b* (5) was intended to preserve in bankruptcy the priorities in payment afforded creditors by the State laws. It was not intended to afford any creditor the right to appropriate a cause of action to recover property conveyed in fraud of creditors nor to appropriate by an order of distribution in

bankruptcy the proceeds arising from such property when recovered by the trustee. Sections 70*a* (4) and 70*e* of the act expressly negative such intent.

It is not our contention that the Circuit Court of Appeals erred in assuming jurisdiction in the appeal and deciding this case as it did. In fact, as intimated by this court in several of the cases above cited, the Circuit Court of Appeals perhaps had the right in the appeal to consider those questions of law which might have been brought up to it in the revisory proceeding, but the question of practice being involved in some doubt as stated by the Circuit Court of Appeals, the petition for the writ of certiorari is brought to this court as a measure of protection to the appellees.

Respectfully submitted,

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GLOBE BANK AND TRUST COMPANY OF PADUCAH, KENTUCKY, *v.* MARTIN, TRUSTEE IN BANKRUPTCY OF ATKINS.

FIRST NATIONAL BANK OF PADUCAH, KENTUCKY, *v.* SAME.

OLD STATE NATIONAL BANK OF EVANSVILLE, INDIANA, *v.* SAME.

MARTIN, TRUSTEE IN BANKRUPTCY OF ATKINS, *v.* GLOBE BANK & TRUST COMPANY OF PADUCAH, KENTUCKY.

APPEALS FROM UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Nos. 99, 100, 101, argued December 4, 7, 1914, and No. 292, submitted December 4, 1914.—Decided February 23, 1915.

A controversy over the distribution of a fund in the hands of the trustee arising from proceeds of property attached under attachment by a creditor, within four months of the petition, the lien of which has been preserved for the estate, is a controversy arising in bankruptcy proceedings and appealable, as in other cases in equity, under the Circuit Court of Appeals Act, and is not controlled by § 25 of the Bankruptcy Act.

This case being appealable to this court under the Circuit Court of Appeals Act, the petition for writ of certiorari is denied.

The title with which the trustee is vested under § 70-a includes all property transferred by the bankrupt in fraud of creditors and which prior to the bankruptcy might have been levied upon and sold under judicial process against him.

Under § 70-e, the trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and the trustee has authority to recover the property in the hands of anyone not a *bona fide* holder for value.

The provisions of the Bankruptcy Act in regard to attachments and liens acquired under state laws are superior to all state laws in virtue of the constitutional authority of Congress to enact a uniform system of bankruptcy.

Even though a fund representing property conveyed in fraud of creditors may be recovered through the state court under an attachment obtained by creditors who, under state law, would alone share in the fund and the lien of which has been preserved under § 67-b, disposition of the fund is determined by the rule of distribution prevailing in the Federal jurisdiction and not by that in the state court in the absence of bankruptcy, and so *held* that a fund so obtained should be distributed between all the creditors as a general asset of the estate and not between those creditors who would alone have shared in the fund had their attachment been obtained more than four months prior to the petition.

The liens on property passing to the trustee to which a preference is given under § 64-b in accordance with state laws are statutory liens such as those for furnishing labor and materials and that section does not prevent the application of § 67-f in the circumstances here shown.

193 Fed. Rep. 841; 201 Fed. Rep. 31, affirmed.

THE facts, which involve the construction of § 67-f of the Bankruptcy Act of 1898, and the application of proceeds resulting from a lien preserved for the estate thereunder, are stated in the opinion.

Mr. D. H. Hughes, with whom *Mr. Alexander Gilchrist*, *Mr. C. K. Wheeler* and *Mr. J. G. Wheeler* were on the brief, for appellants:

The Circuit Court of Appeals erred in refusing to dismiss appeal and petition for review. *In re Mueller*, 135 Fed. Rep. 711; *In re Loving*, 224 U. S. 183; *Coder* v. *Arts*, 213 U. S. 213; Bankruptcy Act, 1898, §§ 25-a and 25-b.

The Circuit Court of Appeals also erred in holding that recovery of property under § 1907, Carroll's Kentucky Statutes, ed. 1909, is for benefit of creditors whose debts were created after voluntary conveyance, as well as those whose debts were created before such conveyance, although

no actual fraud shown. *Atkins* v. *Globe Bank*, 124 S. W. Rep. 879; Bankruptcy Act, 1898, §§ 64-b–(5), 67-f, 70 (4); *In re Bennett*, 153 Fed. Rep. 673; *In re Allen* (D. C.), 96 Fed. Rep. 512; *Merchants Bank* v. *Sexton*, 228 U. S. 634; *In re Laird*, 109 Fed. Rep. 550; *First National Bank* v. *Staake*, 202 U. S. 141; *Miller* v. *New Orleans Fertilizer Co.*, 211 U. S. 496.

Mr. W. F. Bradshaw, Jr., and *Mr. J. D. Mocquot* for appellee, and for petitioner in No. 292:

Kentucky Statutes, §§ 1906, 1907, providing for recovery of property conveyed in fraud of creditors, affords the creditor no lien upon the property except such as is acquired by and arises at the time of the institution of the creditor's action. The statute merely affords a cause of action. The creditor first attaching in such an action acquires a first lien on the property. *Stamper* v. *Hibbs*, 94 Kentucky, 358.

Kentucky Statutes, §§ 2487, 2488, provide for an inchoate lien which exists before the institution of the action. An action brought under those statutes is for the purpose of enforcing a preëxisting lien. *In re Bennett*, 153 Fed. Rep. 673; *Hall* v. *Guthrie*, 103 S. W. Rep. 731; *Winters* v. *Howell*, 109 Kentucky, 163.

An action for the recovery of property fraudulently conveyed by a bankrupt vests exclusively in the trustee under the provisions of §§ 70-a (4) and 70-e of the Bankruptcy Act of 1898. *Anderson* v. *Anderson*, 80 Kentucky, 638; *Annis* v. *Butterfield*, 58 Atl. Rep. 898; *Buffington* v. *Harvey*, 95 U. S. 99; *Bush* v. *Export Storage Company*, 136 Fed. Rep. 918; *Clark* v. *Larremore*, 188 U. S. 486; *In re Downing*, 201 Fed. Rep. 93; *Glenny* v. *Langdon*, 98 U. S. 20; Gray, 3 Am. Bankruptcy, 647; 62 N. Y. Supp. 618; *Hunt* v. *Doyal*, 57 S. E. Rep. 489; *Moyer* v. *Dewey*, 103 U. S. 647; *Ruhl-Koblegard* v. *Gillespie*, 61 W. Va. 584; *Trimble* v. *Woodhead*, 102 U. S. 647; *Williamson* v. *Seldon*, 53 Minnesota, 73.

Although in the absence of bankruptcy only certain creditors could, under the state law, recover the property fraudulently conveyed, when bankruptcy intervenes the property fraudulently conveyed passes as an asset of the estate, recoverable by the trustee for the benefit of the creditors generally. *Annis* v. *Butterfield*, 58 Atl. Rep. 898; *Clark* v. *Larremore*, 188 U. S. 486; *In re Downing*, 201 Fed. Rep. 93; *First National Bank* v. *Staake*, 202 U. S. 141.

A controversy between the trustee representing general creditors on one hand and a class of creditors claiming exclusive right to the fund realized from the recovery of property fraudulently conveyed on the other hand, the property being at the time of the bankruptcy in the adverse possession of the fraudulent vendee, constitutes a controversy arising in a bankruptcy proceeding appealable under § 24-a of the Bankruptcy Act. *Coder* v. *Arts*, 213 U. S. 223; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545; *In re Loving*, 224 U. S. 183; *In re Mueller*, 135 Fed. Rep. 711; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415; *Thomas* v. *Sugarman*, 218 U. S. 129; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344.

If this controversy is to be regarded as involving only an order of distribution under the claim of the appellants to a lien upon the fund, it may then be held a bankruptcy proceeding reviewable in a revisory proceeding in the Circuit Court of Appeals under § 24-b, and reviewable by this court on writ of certiorari. But even in such event, inasmuch as the appeal involves both questions of law and of fact, and a writ of certiorari only a question of law, this court may retain jurisdiction upon either proceeding and determine the question of law. *Bryan* v. *Bernheimer*, 181 U. S. 188; *Duryea Power Co.* v. *Sternbergh*, 218 U. S. 299; *First National Bank* v. *Chicago Trust Co.*, 198 U. S. 280; *Holden* v. *Stratton*, 191 U. S. 115.

By whatever means the fund representing property conveyed in fraud of creditors may be recovered and

brought into the bankruptcy court, the disposition of the fund in bankruptcy is determined by the rule of distribution prevailing in the Federal jurisdiction, and is not affected by any rule of distribution prevailing in the state court in the absence of bankruptcy. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 307; *First National Bank* v. *Staake*, 202 U. S. 141; *Miller* v. *New Orleans Fertilizer Co.*, 211 U. S. 496.

In the Supreme Court neither party will be permitted to abandon the issues made by them and considered by the inferior courts and in this court take the position that their rights really rested upon other grounds not at issue. *Tefft* v. *Munsuri*, 222 U. S. 114.

MR. JUSTICE DAY delivered the opinion of the court.

These are appeals from a decree of the United States Circuit Court of Appeals for the Sixth Circuit involving the distribution of a fund in the hands of a Trustee in Bankruptcy. The cases are reported in the Circuit Court of Appeals in 193 Fed. Rep. 841 and 201 Fed. Rep. 31.

One Thomas J. Atkins, upon a petition in involuntary bankruptcy, was, on December 28, 1908, in the United States District Court for the Western District of Kentucky, duly adjudicated a bankrupt. On December 3, 1906, the bankrupt conveyed certain parcels of real estate to his son, Edward L. Atkins, and to the children of said Edward L. Atkins. At the time of the conveyance, the bankrupt was indebted to the Globe Bank and Trust Company of Paducah, Kentucky, the First National Bank of Paducah, Kentucky, and the Old State National Bank of Evansville, Indiana. He also became indebted, subsequently to the delivery of said deed, to certain other creditors in considerable sums. On August 25, 1908, the Globe Bank & Trust Company instituted a suit in the

McCracken Circuit Court of Kentucky, against Atkins and the vendees of said deed, asking a judgment for the amount of the debt, and seeking to set aside the deed of conveyance as fraudulent and void, causing at the same time a writ of attachment to issue, which writ of attachment was levied upon the real estate described in the deed. Similar actions were begun by the First National Bank of Paducah, and the Old State National Bank of Evansville, asking the same relief, and in each of said actions attachments were issued and levied upon the same property. These suits were begun and the attachments issued within four months of the filing of the petition in bankruptcy. Arthur Y. Martin was duly elected trustee in bankruptcy. On January 9, 1909, the Globe Bank & Trust Company filed its petition contesting the jurisdiction of the bankruptcy court, and its right to interfere with the proceedings in the state court for the recovery of the property as aforesaid. On January 20, 1909, the Globe Bank & Trust Company filed a second petition, praying that the attachment lien be preserved under § 67-f of the Bankruptcy Act, and that it be permitted to make the trustee, A. Y. Martin, a defendant in said state court proceeding. On February 18, 1909, the bankruptcy court entered an order, directing that the attachment lien be preserved for the benefit of the bankrupt estate, as provided in § 67-f and the referee, under authority from the court made an order authorizing the trustee to institute an action for the recovery of the property and to intervene in the state court. Thereafter the trustee in bankruptcy instituted an action in the McCracken Circuit Court, praying that said conveyance be set aside as fraudulent and void, as against creditors both before and after the execution and delivery of the deed, and setting up his right as trustee in bankruptcy to be substituted as the real party in interest in the suits then pending in the state court, and further praying that all rights of action and recoveries resulting

therefrom should be decreed to pass to the trustee as assets of the bankrupt estate.

The trustee's action was consolidated with the actions then pending in the McCracken Circuit Court, brought by the creditors, and thereafter judgment was rendered, adjudging that enough of the property be sold to realize the amount of the creditors' debts existing at the time of the conveyance, and adjudging that the conveyance was not actually fraudulent and therefore not voidable as to creditors whose debts were created after the delivery of the deed, and that court appointed the trustee in bankruptcy a special commissioner to sell the property and hold all the proceeds subject to the further order of the court in the further and final distribution of such proceeds, or subject to orders of the District Court of the United States for the Western District of Kentucky in its final distribution of the entire assets of the estate of such bankrupt, and the final adjustment and settlement of its affairs before such court in such proceedings now pending in bankruptcy, "and the rights of all creditors in such bankrupt proceedings in the distribution or disposition of such proceeds by the bankrupt estate are hereby reserved and not determined, but left open for final adjudication among them in such proceedings in bankruptcy."

The trustee, as well as other parties, appealed to the Kentucky Court of Appeals, and that court rendered a judgment which we shall have occasion to consider more at length hereafter.

Subsequently, after the case had gone back to the McCracken Circuit Court from the Court of Appeals, the trustee filed his report of the sale of the property, and asked the court to direct him in the distribution of the proceeds of the sale in his hands. The Globe Bank & Trust Company, the First National Bank, and the Old State National Bank of Evansville, Indiana, claimed the whole of the fund recovered, and afterwards, upon the hearing, the

referee in bankruptcy entered an order, adjudging the three banks named, whose debts were created antecedent to the execution and delivery of the deed, entitled to the entire proceeds of the property, being the sum of $16,146.58, a sum less than the total amount of their debts, leaving nothing for distribution among general creditors.

The District Court affirmed the action of the referee, and an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit. A petition for review was filed at the same time.

It further appears that the Globe Bank & Trust Company, the First National Bank, and the Old State National Bank of Evansville, Indiana, had originally filed proofs of debts, setting up their claims in bankruptcy. Afterwards the Banks filed amended and supplemental petitions and proofs of claims setting up their alleged priority to which pleadings the trustee filed a response and the order appealed from was entered. The Circuit Court of Appeals, treating the case as before it upon appeal (201 Fed. Rep. 31), entered a decree from which the present appeal is taken, reversing the order and decree of the District Court, and finding that the trustee held the fund for distribution among all the creditors of the estate, and not for the exclusive benefit of the banks named as prior creditors.

It is first contended that this court has no jurisdiction because the case, if not properly before the Circuit Court of Appeals by petition for review, should have been taken to that court under § 25 of the Bankruptcy Act, which section limits the time of appeal and requires special findings of fact in bankruptcy proceedings upon claims. We are of opinion, however, that the Circuit Court of Appeals rightly decided (201 Fed. Rep. 31) that the contest over the distribution of this fund in the hands of the trustee was a controversy arising in the bankruptcy proceedings, and hence appealable as other cases in equity

under the Circuit Court of Appeals Act, and the appeals to the Circuit Court of Appeals and this court were properly taken. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Coder* v. *Arts*, 213 U. S. 223; *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545; *Matter of Loving*, 224 U. S. 183; *In re Mueller*, 135 Fed. Rep. 711. This view of the jurisdiction of the court results in the denial of the petition for writ of certiorari in No. 292, submitted at the same time with the other cases now under consideration.

We come then to the cases upon their merits. Section 67-f of the Bankruptcy Act (July 1, 1898, c. 541, 30 Stat. 544, 565) provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Under § 70-a of the Bankruptcy Act the trustee of the estate is vested with the title of the bankrupt, including all property transferred by him in fraud of creditors and

property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.

Under § 70-e of the same Act, the Trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and he is given authority to recover the property in the hands of anyone not a bona fide holder for value. The authority of the trustee to prosecute such actions does not seem to be questioned, and is ample for the purpose involved in the present suit. *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, 425, 426.

In the cases in the McCracken Circuit Court the property was charged to have been conveyed in fraud of creditors and also involved a consideration of § 1907 of the Laws of Kentucky (Carroll, 1909), which provides that:

"Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers."

It is the contention of the appellants that, as the conveyances were held in the Kentucky courts to be void under that section as to creditors whose debts and demands then existed, and because of the lack of actual fraud were held not to be void as to subsequent creditors or purchasers, they are entitled to priority, because of the Kentucky statute and the judicial determinations of the state court.

The argument of the appellants does not depend upon the attachments alone, but is based upon their right to

subject the property, which right they contend existed long prior to the four months before the institution of the bankruptcy proceedings. But this argument must be considered in the light of the provisions of § 67-f. That section distinctly provides that all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, within four months of the filing of the petition in bankruptcy, shall be deemed null and void, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, as was done in this case, order that the right under the levy, judgment, attachment or other lien be preserved for the benefit of the estate, in which event the same shall pass to and be preserved by the trustee for the benefit of the estate. Except for the attachments, the appellant banks had no specific lien upon the estate.

The attachments were doubtless sued out because under the Kentucky statute the parties were entitled thereby to gain a preference over other intervening creditors. *Stamper* v. *Hibbs*, 94 Kentucky, 358. The creditors had a right, it is true, to bring an action to set aside the conveyance as against existing creditors, but that right was not supported by any preëxisting lien. The suit was instituted to assert the creditors' rights against the property and thus to subject it to the payment of their claims. The banks had a right of action for this purpose, but the property was not subjected to attachment, nor was there any action seeking to enforce rights in the property until the suits were begun and that was within four months of the filing of the bankruptcy petition.

With attachments and liens thus acquired under state laws, the Bankruptcy Act dealt in provisions which were superior to all state laws upon the subject in virtue of the

constitutional authority of Congress to enact a uniform system of bankruptcy. *In re Watts and Sachs*, 190 U. S. 1, 27; *First Nat'l Bank* v. *Staake*, 202 U. S. 141, 148.

The difference, having the provisions of the act in view, between the beginning of a proceeding to assert liens that existed more than four months before the filing of the petition in bankruptcy, and the attempt to create them by attachment and other proceedings within four months, has been recognized in decisions of this court. In *Metcalf* v. *Barker*, 187 U. S. 165, a proceeding to give effect to a prior lien existing more than four months before the filing of the bankruptcy petition was held not within the meaning of § 67-f of the Bankruptcy Act. In *Clarke* v. *Larremore*, 188 U. S. 486, *Metcalf* v. *Barker* was distinguished, and it was held that where a judgment in the state court had gone so far that an execution had been realized by sale of the debtor's property, and the money was yet in the hands of the sheriff, who held it under a restraining order issued in a suit by another creditor, and the time for the return of the execution had not yet elapsed, and a bankruptcy petition was filed, the money did not belong to the judgment creditor, but passed under § 67-f to the Trustee in Bankruptcy.

Section 67-f came again under consideration in *First National Bank* v. *Staake*, *supra*, in which property of the bankrupt had been seized by attachment within four months of the filing of the petition, and § 67, particularly subdivision f, was given full consideration, and it was held that where the benefit of the attachment was claimed by the trustee in bankruptcy, and the court had ordered the same to be preserved for the benefit of the estate, so much of the value of the property attached as was represented by the attachment passed to the Trustee for the benefit of the entire body of creditors; that the statute recognized the lien of the attachment, but *distributed the lien* among the whole body of creditors. In that case it was contended

that § 67-f referred only to liens upon property which, if such liens were annulled, would pass to the Trustee in Bankruptcy, but this court answered that argument by saying:

"This clause evidently contemplates that attaching creditors may acquire liens upon property which would not pass to the bankrupt, if the liens were absolutely annulled, and therefore recognizes such liens, but extends their operation to the general creditors. Had no proceedings in bankruptcy been taken doubtless this property would have been sold for the benefit of the attaching creditors." And in the *Staake Case* it was held that it made no difference that the diligent creditor was thereby deprived of a preference which would have been entirely legal under the state law. It was also held that the rule that the trustee stands in the shoes of the bankrupt has no application to § 67-f where the trustee is permitted to assert a superior right for the benefit of general creditors.

The section (67-f) was again before this court in *Miller* v. *New Orleans Fertilizer Co.*, 211 U. S. 496. In that case, *First National Bank* v. *Staake*, *supra*, was quoted with approval, and it was held that the right to preserve liens under subdivision f of § 67 extended to causes of action arising under state law, and that while the state court had the right to entertain suits to avoid conveyances under the law of the State, under § 67-f the right to the lien of preference arising from the suit might by authority of the court be preserved for the benefit of the bankrupt estate. In that case it was further held that the proceeding and judgment in the state court did not prejudice the right of the bankruptcy court to determine among what creditors the property should be distributed, and that such questions were exclusively cognizable in the bankruptcy court. See also *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354.

It is contended, however, by the appellants, that if we

assume that under § 67-f of the Bankruptcy Act, the property or its proceeds must come to the trustee to be distributed by him under the orders of the bankruptcy court for the benefit of the estate, that inasmuch as under the statute of Kentucky creditors existing prior to the making of the deed in question were entitled to be preferred in the distribution of the proceeds, that right is protected by sub-section 5 of § 64-b of the Bankruptcy Act, which provides that the debts to have priority, except as therein provided, and to be paid in full out of bankrupt estates, are, among others, "debts owing to any person who by the laws of the States or the United States is entitled to priority," and it is contended that this subsection, as considered by the Circuit Court of Appeals of the Sixth Circuit in an opinion written by the late Justice Lurton, *In re Bennett*, 153 Fed. Rep. 673, maintains that position. But an examination of that case shows that it dealt with a statutory lien created under § 487 of the Kentucky statutes, giving preferences to persons furnishing materials or supplies to manufacturing companies, and creating a lien upon the property in cases of such companies in case of an assignment for the benefit of creditors, or where the property is distributed among creditors by operation of law or by act of the company. It was held that such statutory lien gave a substantial right in or inchoate lien upon the property from the date of furnishing the material, within the spirit and meaning of § 64-b sub-section 5, of the Bankruptcy Act. That case, and such cases as *In re Laird*, 109 Fed. Rep. 550, which dealt with labor claims, recognize the purpose of Congress in passing § 64-b, to maintain statutory liens and preferences in such cases in the distribution of the bankrupt estate.

We are unable to see that the case has any bearing upon the construction of § 67-f and the cases now under consideration. Under our system of bankruptcy, and in the

administration of assignments under state laws, there are certain persons such as those furnishing material or labor that, in certain specified ways, are given preference in the distribution of insolvent estates. It is a statutory lien of that kind with which the court dealt in *In re Bennett.*

Nor are we able to discover anything excluding the right of the Bankruptcy Court to itself distribute the property in the proceedings had in the Kentucky courts where the trustee intervened on the order of the judge. In his petition filed in the McCracken Circuit Court, Martin, the trustee, alleged that the conveyances made by Atkins were fraudulent and should be set aside and the property adjudged to belong to the trustee of the bankrupt for the benefit of his creditors. He also set up the order which had been made under § 67-f in the Bankruptcy Court. In that case, the McCracken Circuit Court held that the conveyances were not actually fraudulent, but were constructively so as to antecedent creditors. The property was ordered to be sold and the trustee in bankruptcy appointed special commissioner and directed to hold the proceeds of the sale subject to the order of final distribution of the bankruptcy court, as appears in that part of the judgment which we have already quoted. From that judgment the trustee and the grantees under the deed appealed. Upon the trustee's appeal the court in its opinion (124 S. W. Rep. 879) held that the trustee had not been prejudiced by the failure of the court below to allow the action to be prosecuted in his name, nor had the judgment prejudiced his substantial right as trustee for the benefit of all the creditors. The court cited § 70 of the Bankruptcy Act, recognizing the right of the trustee, vested with the title of the bankrupt, to bring proceedings in the bankruptcy court or the state court for its recovery, and his right to be substituted by the court as plaintiff in any suits brought by creditors for the purpose of recover-

ing property fraudulently conveyed by the bankrupt, and in its opinion the court said (p. 881):

"It is true the trustee asked that the conveyance be declared fraudulent as to all creditors both subsequent and antecedent, while the court only adjudged that the conveyance was fraudulent as to antecedent creditors, but we do not understand that the Trustee in bankruptcy is complaining of the judgment in so far as it refused to adjudge the conveyance actually fraudulent. The judgment does not undertake to dispose of the proceeds that may be realized from the sale of the property, but leaves this question open for future determination, and we do not doubt that, when the court comes to make an order concerning the disposition of the proceeds in the hands of the trustee as special commissioner, it will direct that the proceeds be paid over to the trustee in bankruptcy to be administered as a part of the estate of the bankrupt in the bankruptcy court. In anticipation of what we assume the court will do, we may with propriety in this opinion direct that it make such orders. If the court in the judgment had undertaken to divest the trustee of the control of this fund, we would upon this point reverse the judgment with directions to proceed as indicated, but, as the court did not make such an order, we are of the opinion that on the appeal of the trustee the judgment of the lower court should be affirmed."

Therefore it appears that the judgment of the lower court, directing the proceeds to be disposed of in the bankruptcy proceedings, was distinctly affirmed, and the court declared that a contrary holding would have been reversed.

After dealing with the questions brought up by the grantees in the deed, it was held that the court below was wrong in fixing the date of the delivery and acceptance of the deed as of April 20, 1907, instead of December 4, 1906, and the court said (page 882):

"To what extent this will affect the judgment creditors

we are not advised; but only those creditors whose debts were created previous to December 4, 1906, are entitled to participate in the proceeds realized from the sale of the property. If the proceeds amount to more than sufficient to pay such debts, the surplus should be paid to the grantees in the deed."

But we do not think in this part of the opinion the Court of Appeals of Kentucky intended in anywise to depart from its affirmation of the judgment of the Circuit Court upon the trustee's appeal and its explicit recognition of the authority of the Bankruptcy Court to control the disposition of the proceeds of the sale. The court did not consider § 67-f in its opinion, nor did it give, as it had no authority so to do, any specific direction as to the distribution of the fund in the Bankruptcy Court. The McCracken Circuit Court after the mandate came down repeated its order as to the distribution in the Bankruptcy Court by reference to its former judgment, and the trustee applied for an order in that court which was made and subsequently appealed from in the present case.

Under the Bankruptcy Act, when the conveyance was set aside, the lien or attachment being within four months of the bankruptcy proceeding, the bankrupt being then insolvent, of which fact no question is made, and the Bankruptcy Court having ordered that the lien be preserved for the benefit of creditors, it became good under the provisions of the Bankruptcy Act for the benefit of all the creditors of the estate. Under this order the Bankruptcy Court had acquired jurisdiction,—the state court had no possession of the property except such as the attachment gave—and after the conveyance was set aside in the state court, for which purpose the state court is given concurrent jurisdiction by § 70 of the Bankruptcy Act, it had the right to determine for itself the disposition of the fund arising from the property sold. *Miller* v. *New Orleans Fertilizer Co.*, 211 U. S. *supra.*

We find no error in the decree of the Circuit Court of Appeals, directing the distribution of the proceeds of the sale for the benefit of all the creditors of the estate. The decree is accordingly

Affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE MCREYNOLDS dissenting.